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ABSTRACT

The Media and Law section of this collection of conference presentations contains the following 11 papers: "Independent State Constitutional Analysis of Public Concern and Opinion Issues in Defamation Litigation, 1977-1993" (James Parramore); "The President John F. Kennedy Assassination Records Collection Act of 1992: Will Sun Finally Shine over Dealey Plaza" (Jennifer Greer); "If You Do the Crime, Will You Do the Time? A Proposal for Reform of State Sunshine Law Enforcement Provisions" (Charles N. Davis and Milagros Rivera-Sanchez); "Sexual Harassment and Vicarious Liability of Media Organizations" (Matthew D. Bunker); "Solid-Gold Photocopies" A Review of Fees for Copies of Public Records Established under State Open Records Laws" (John R. Bender); "Is Your Boss Reading Your E-Mail? Privacy Law in the Age of the 'Electronic Sweatshop'" (Laurie Thomas Lee); "The Legal Rules of Broadcast Newsgathering" (Tom Letts); "The Privacy Exemptions and Open Government: Narrowing the Public Interest Standard under the FOIA in the Wake of 'Reporters Committee'" (Matthew D. Bunker and Stephen D. Perry); "Feminism and Free Expression: Silence and Voice" (Robert Jensen and Elvia R. Arriola); "Digital Imaging, the News Media and the Law: A Look at Libel, Privacy, Copyright and Evidence in a Digital Age" (Betty J. Ramos); and "Lani Guinier and the Press" (Kevin M. Sanders). (RS)

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Independent State Constitutional Analysis of Public Concern and Opinion Issues in Defamation Litigation, 1977-1993

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Independent State Constitutional Analysis of Public Concern and Opinion Issues in Defamation Litigation, 1977-1993

This study considers the scope and legal significance of independent state constitutional analysis in modern defamation litigation involving public concern and opinion issues.[1] Through case law analyses of state and federal appellate court defamation decisions from 1977 through 1993, it explores the diverse and often contradictory interpretive positions associated with state freedom of expression provisions in cases where courts are charged with setting the level of legal protection for opinion and debate on matters of public concern.

Part one positions this study within the context of modern defamation litigation. Parts two and three are case law analyses. Part two looks at independent state constitutional protection for and limitations on expression dealing with matters of public concern. These same constitutional boundaries regarding expression of opinions are examined in part three. Part four summarizes the findings and identifies patterns emerging from the case law analyses in parts two and three.

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[1] As used in this study, the term "independent state constitutional analysis" refers to situations in which courts clearly distinguish state constitutional law from common law, statutory law or federal constitutional law when addressing defamation issues.

Part One: Background

For more than two centuries, state and federal courts in the United States ostensibly have tried to articulate and apply a system of legal standards and procedures that would balance freedom of expression with protection for reputation. Through a shifting legal landscape, the struggle continues. Social, cultural, political and personal interests permeate a geographically fragmented judiciary that operates within the nebulous borders of a governmental system designed to distribute authority among the national and state governments. Moreover, vacillating boundaries of federalism principles affecting the judiciary–such as state sovereignty and federal supremacy–are further delineated by the nature and history of U.S. Supreme Court involvement in libel jurisprudence.

In short, forces and features of government, society and human nature merge at a busy intersection in defamation law and combine to make the development and implementation of a uniform, objective method for resolving reputational disputes in the United States a rather optimistic aspiration. Sir Frederick Pollock's observations on defamation law, first published in 1929, have only become more poignant with the passing of time:

> No branch of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the

> solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions.[2]

From the late 1770s until well into the twentieth century, state legislatures and courts held primary jurisdiction over expressive liberties.[3] As a consequence, defamation jurisprudence in the United States developed primarily at the state level within common law contexts and reflects the states' geographical, political and historical differences.[4] Significant variations in legal approaches and standards for resolving libel and slander disputes did and do exist among states. "There is no general federal law of defamation," noted a federal district court judge in 1986. "The applicable law depends upon the particular state in which an action for defamation is brought."[5]

Not until *Gitlow v. New York* in 1925 did the U.S. Supreme Court suggest that the First Amendment freedoms of speech and press were shielded from state impairment by the federal Constitution.[6] However, legal scholars often cite the 1964 *New York Times Co. v. Sullivan* decision to broaden the range of protected comment about public officials as the U.S. Supreme Court's first major attempt to restructure defamation law.[7] The Court rooted *Sullivan's* heightened protection of comment on public officials in the First Amendment and served notice to state courts that national standards for freedom of expression were forthcoming. In the years following *Sullivan*, the Supreme Court has decided more than two dozen libel cases in an effort to encourage greater consistency in defamation litigation.[8]

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[2] F. POLLOCK, THE LAW OF TORTS 243 (1929).

[3] *See generally*, The Federalist No. 45 at 292-93 (James Madison) (C. Rossiter ed. 1961) (Writing as "Publius" in 1788, Madison assured readers that the new federal government had neither reason nor authority to intrude into the area of liberties associated with state bills of rights: "The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . . .").

[4] *See e.g.*, D.L. DICKERSON, THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA, xiii (1990) ("Freedom of expression issues, at least until the Civil War, were local problems that each community dealt with in its own way. People were used to operating within relatively isolated or closed communities where there was a heterogeneous population with an unambiguous set of values. Outside interference was unwelcome.").

[5] Keane v. Gannett, 12 Med.L.Rptr. 2252, 2253 (1986).

Reactions to the Court's efforts have been mixed, and criticism of defamation law has intensified in the past two decades. Some critics believe federal attempts to direct and consolidate this active area of law may only have muddied the waters. The search goes on for a system of legal distinctions and standards that would account for a limitless variety of potential defamation scenarios and consistently and appropriately balance protection from libel and slander with the freedom to openly discuss and disseminate opinions on matters of public interest.

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[6] 268 U.S. 652, 45 S.Ct. 625 (1925) (In *Gitlow* the U.S. Supreme Court suggested that state autonomy was limited in setting the standards for freedom of expression because First Amendment freedoms were shielded from state impairment by the due process clause of the Fourteenth Amendment).

[7] 376 U.S. 254 (1964).

[8] Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Coop. Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971); National Ass'n. of Letter Carriers v. Austin, 418 U.S. 264 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 428 (1976); Herbert v. Lando, 441 U.S. 153 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n. 443 U.S. 157 (1979); Keeton v. Hustler Magazine, 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989); Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990); Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419 (1991).

However, the present system of "substantive principles, evidentiary rules, and de facto innovations" is deeply entrenched.[9] It does not appear as if major reform in defamation law is imminent. According to legal scholar David Anderson, "[t]here is no political constituency for statutory reform, and little room within present constitutional constraints for innovation by state courts."[10]

But some courts have rediscovered—or perhaps created—a "little room" for innovation by turning to state constitutions in defamation litigation. State and federal appellate courts, operating within the existing legal framework, have considered the scope of state constitutional speech and press provisions in more than 200 defamation cases since 1977.[11] In a number of these decisions, state

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[9] Anderson, *Is Libel Law Worth Reforming?*, 140 U.Pa.L.Rev. 487, 554 (1991).

[10] *Id.* at 552.

[11] Among more than 3,000 defamation cases published in Media Law Reporter from January 1977 through December 1993, 203 contain at least one judicial reference to state constitutional freedom of expression provisions.

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constitutional factors weighed heavily as courts refined defamation law and litigation at the state level.

The prevailing constitutional definition of a free press, as articulated and periodically refined by the U.S. Supreme Court, reflects only minimum standards of protection for expression—a "federal floor"[12] below which state and local levels of protection cannot fall. Yet under the remnants of our two hundred-year-old system of dual constitutional sovereignty,[13] individual states can develop and erect their own constitutional safeguards for speech and press.[14] In theory, this is a one-way street. States courts legally can establish only higher levels of protection for expression and can do so only under specific circumstances.

Yet the sword of independent state constitutional analysis cuts both ways in defamation litigation. Some courts have evoked the authority of state constitutions to underscore what has been characterized and recognized as a "compelling" state constitutional interest in the individual's right to reputational protection.[15] While such decisions may not directly challenge existing federal defamation standards, they can illustrate both the independent nature of certain state judiciaries and the renewed vitality of state constitutions as alternative, authoritative sources of law.

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[12] *See*, Brennan, *State Constitutions and the Protection of Individual Liberties*, 90 Harv.L.Rev. 489, 550 (1977). ("[T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the States, thereby creating a federal floor of protection.").

[13] *See e.g.*, *The Federalist No. 51* (J. Madison) (C. Rossiter ed.) (1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among separate and distinct governments. Hence a double security arises to the rights of the people." *Id.* at 322).

[14] Brennan, *supra* note 12 at 550 ("[T]he Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor . . . . While state experimentation may flourish above this floor, we have made a national commitment to this minimal level of protection . . . ." (emphasis in original)).

Other state courts clearly have sought to extend state constitutional protection for defamation defendants beyond the minimum levels established by the federal judiciary.[16] Judicial use of state constitutions to expand the scope of protection for expression in defamation actions suggests an extension of the post-1970 state court activism known as the "new judicial federalism,"[17] a growing legal movement no doubt spurred by what many jurists and critics perceive(d) as U.S. Supreme Court retrenchment in the field of civil liberties.[18]

Not surprisingly, it is the unsettled and evolving issues in defamation jurisprudence that have led some courts to plug state constitutional law into defamation's analytical equation. In particular, cases involving protection for expression on matters of public concern and/or opinion appear far more likely to prompt state constitutional analysis than other defamation issues.[19] A cursory review of relevant federal case law shows why.

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[15] *See, e.g., infra* at notes 84 to 96 and 137 to 143 and accompanying text.

[16] *See, e.g., infra* at notes 41 to 83 and 101 to 136 and accompanying text.

[17] *See generally*, Abrahamson & Gutmann, *The New Federalism: State Constitutions*, 71 Judicature 96 (1987); Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 Publius 141 (1986); Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, Judicature 100 (1987); Kaye, *Federalism's Other Tier*, Constitution, vol. 3, no. 1 pp. 48-54 (Winter 1991).

[18] *See, e.g.*, Holmes, *Frustrated by Change in Federal Courts, A.C.L.U. to Concentrate on States*, N.Y. Times (natl. ed.), Sept. 30, 1991, at A11, col.1.

The U.S. Supreme Court's 1964 *Sullivan* decision,[20] which requires public officials to prove actual malice in order to win libel cases, made plaintiff status a central issue in defamation litigation. Three years later, the Court extended the actual malice requirements to all plaintiffs who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[21] Fault requirements in public official and public figure cases provide substantial constitutional protection for defamation defendants, and the "lower courts have tended to view both . . . categories expansively."[22]

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[19] Media Law Reporter published 203 defamation decisions from January 1977 through December 1993 which referred to the freedom of expression clauses in state constitutions. Sixty-seven of these 203 decisions (33%) involved constitutional protection for expression on matters of public concern and/or opinion. The next highest percentages among other identifiable defamation issues prompting state constitutional references were: protection of sources and access to courts and records (10.83%), truth as a libel defense (5.4%), summary judgment (5.4%), and damage awards (3.9%).

[20] 376 U.S. 254 (1964).

[21] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result).

[22] Anderson, *supra* note 9 at 500. Courts have determined that a wide range of individuals warrant public figure status. *See, e.g.*, Holt

A 1974 Supreme Court decision established the "federal floor" or minimum level of protection for defamation defendants. The Court's ruling in *Gertz v. Robert Welch, Inc.*, meant that all plaintiffs must at minimum show negligence on the part of a mass media defendant to win a libel judgment.[23]

While *Gertz* left intact the actual malice fault requirement for public figures,.the decision left states free to frame their own rules in cases involving private plaintiffs, provided the standard of care is at least negligence.[24] Following *Gertz*, state courts were permitted to develop local tiers of protection extending "above and beyond [the] federal constitutional floor"[25] in defamation actions brought by private plaintiffs. State court reactions to this federally endorsed autonomy were predictable. The negligence standard itself has been variously applied and interpreted,[26]

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v. Cox Enters., 590 F.Supp. 408, 412 (1984) (college football player); Roche v. Egan, 433 A.2d 757, 762 (1981) (police officer); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1300, *cert. denied*, 499 U.S. 898 (1980) (grocery business mogul); James v. Gannett Co., 353 N.E.2d 834, 839 (1976) (belly dancer); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1255 (1980), *cert. denied*, 452 U.S. 962 (1981) (ex-girlfriend of Elvis Presley, retired football star's wife).

[23] 418 U.S. 323 (1974).

[24] *Id.* at 347.

[25] Brennan, *supra* note 12 at 550.

[26] *See, e.g.*, FRANKLIN & ANDERSON, MASS MEDIA LAW 334 (Fourth Ed. 1990) ("[A]lthough most states have applied the preponderance of evidence standard in *Gertz* cases, Ohio has decided to require clear and convincing evidence of negligence in a *Gertz* case as a matter of law." (citing Lansdowne v. Beacon Journal Publishing Co., 32 Ohio St.3d 176; 152 N.E.2d 979 (1987).). For further discussion of varied state approaches to this issue, *see infra* at notes 41 to 143 and accompanying text.

and ongoing "definition of the term negligence will undoubtedly vary from state to state and possibly from judge to judge within a state."[27]

The cumulative effect of these decisions emphasizing plaintiff status is a range of judicial options for liability standards ranging from actual malice to ordinary negligence. In addition, the idea that certain categories of expression–such as opinion and speech on matters of public concern–merit a constitutional protection that is not necessarily tied to a defamation plaintiff's status, has led to greater divergence in defamation litigation.

The concept of a "public issue" or "public concern" rationale for increased protection of certain types of speech received wide-spread consideration in the 1970s following the U.S. Supreme Court decision in *Rosenbloom v. Metromedia, Inc.*[28] The case represented the Court's brief departure in defamation litigation from a fundamental focus upon plaintiff status to a focus upon speech content.[29] The concept of heightened protection for speech on matters of public concern, although not always recognized as a determinative issue, continues to surface in federal and state defamation cases.[30] In recent defamation actions involving private figure plaintiffs, some courts have considered it important to determine whether or not potentially libelous speech deals with matters of public concern. And such cases occasionally have led jurists to consider whether expression on public issues warrants greater protection under state constitutional law.[31]

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[27] D. PEMBER, MASS MEDIA LAW, 153 (Fifth Ed. 1990).

[28] 403 U.S. 29; 91 S.Ct. 1811, 1 Med.L.Rptr. 1597 (1971).

[29] In a plurality opinion, Justice Brennan discussed the *Rosenbloom* analysis: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." 403 U.S. 29, 43 (1971).

The same basic question has surfaced with regard to state constitutional protection for opinion. In 1974, Justice Powell's dicta in *Gertz* emphasized a need to determine if potentially libelous material represents assertions of fact or opinion.[32] In subsequent years the Court provided only limited guidance on this issue. Consequently, "a great many judges and lawyers took (the *Gertz* dicta) to mean that statements of opinion cannot be used as the basis for a successful libel suit."[33] The lower federal courts and state courts responded to Justice Powell's statements by fashioning a variety of approaches designed to distinguish fact from opinion.[34] These judicial efforts prompted U.S. Supreme Court Justice Rehnquist to complain in 1985 that lower courts had seized upon the word "opinion" in *Gertz* to "solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.'"[35]

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[30] *See, generally,* W.E. FRANCOIS, MASS MEDIA LAW AND REGULATION, 158-61 (Sixth Ed. 1994) (Author suggests that U.S. Supreme Court decisions in the 1980s indicate that the public interest requirement ". . . remains potent, perhaps even crucial, to the outcome of First Amendment libel cases." (*Id.* at 159)).

[31] *See, e.g.,* cases discussed *infra* at notes 41 to 96 and accompanying text.

[32] 418 U.S. 323 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Id.* at 339-40).

[33] Pember, *supra* note 27, at 9.

With its 1990 ruling in *Milkovich v. Lorain Journal Co.*, a Supreme Court majority indicated that the passage in *Gertz* "was not intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[36] And while the Court did attempt to distinguish between protected and unprotected opinion,[37] the "impact of this decision remains, in large part, in the hands of the lower courts."[38] Specific federal guidance on this issue remains limited, and state courts shoulder much of the responsibility for developing or adopting tests to determine if defamatory comments that seem to be opinion contain assertions of objective fact. Already, however, it is clear that some courts have not fully embraced the U.S. Supreme Court's approach to distinguishing fact from opinion. Some seem willing to provide greater protection for expression of opinion than the federal judiciary, and state constitutions have been seen as a means to do so.[39]

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[34] *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 977 (D.C. Cir. en banc 1984), *cert. denied* 471 U.S. 1127 (1985) (An influential four-part test for distinguishing fact from opinion emerged from the *Ollman* case).

[35] 750 F.2d 970, at 977 (D.C. Cir. en banc 1984), *cert. denied* 471 U.S. 1127, 1129 (1985) (Rehnquist, J. dissenting).

[36] 110 S.Ct. 2695, 2705 (1990) (Opinion by Rehnquist, C.J., Brennan and Marshall, J.J. dissenting). The *Milkovich* ruling is examined in greater detail *infra* at notes 97 to 100 and 117 to 125 and accompanying text.

[37] 110 S.Ct. 2695, 2704-08 (1990) (Under *Milkovich*, expressions of "opinion" which imply an assertion of objective fact may be actionable).

[38] Pember, *supra* note 27, at 10.

The interpretive latitude associated with defamation liability standards and the dynamic state of the law in public concern and opinion cases have combined to inspire issue-specific yet sometimes diametrically opposed interpretations of state constitutional speech and press provisions. Parts two and three of this study look at defamation actions which raised judicial questions about constitutional protection for expression on matters of public interest and/or protection for opinion. Cases selected for analysis also contain at least one judicial reference to the freedom of expression provisions associated with state constitutions.[40] Part two looks at independent state constitutional protections for and limitations on expression dealing with matters of public concern. Part three examines these same constitutional boundaries regarding expression of opinions. Although an attempt has been made to look separately at public concern cases and opinion cases, both elements sometimes surface in a single defamation case.

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[39] *See, e.g.*, cases discussed *infra* at notes 101 to 136 and accompanying text.

[40] Sixty-seven decisions meeting these criteria were found through an analysis of all defamation opinions published in Media Law Reporter from Jan. 1, 1977, through Dec. 31, 1993 (Volumes 2-21). More than 3,000 defamation opinions appeared in Media Law Reporter from 1977 through 1993. Defamation opinions wherein courts have considered state constitutional questions fall into one of two general categories: 1) those in which state constitutional factors are considered independently of any federal constitutional issues, and 2) those in which state constitutional factors are examined in conjunction with federal First Amendment considerations (joint references). Of the 67 cases meeting the collection criteria, 41 contain *independent* state constitutional references (61.1%) and 26 contain only joint references (38.9%). Although the joint reference cases relate to this study, space limitations preclude their examination in this format. In general, joint reference cases reveal little about whether a particular court is open to conducting independent state constitutional analyses in defamation litigation. Such references do, however, show courts' awareness that

Part Two: State Constitutional Protection and Regulation of Expression on Matters of Public Concern

Courts regularly have viewed state freedom of expression provisions as relevant legal doctrine in the establishment of appropriate liability standards in defamation litigation. Much judicial activity in this area centers on fault standards for private figure defamation plaintiffs. In particular, disagreement about whether private figure plaintiffs involved in matters of public concern should be required to show more than ordinary negligence has led to considerable diversity from state to state. This section looks at ways in which courts have used state constitutional analyses to address this dynamic legal issue.

Increased Protection for Expression on Matters of Public Concern Under State Constitutions

Unwilling to reject completely the Supreme Court's *Rosenbloom* analysis and convinced that expression on public issues warrants enhanced legal protection, certain jurists

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state constitutional law-whether in concert with or independent of its federal counterpart-is part of the general defamation landscape.

have developed a theoretical rationale for protecting such speech that is rooted in the free expression/libel clauses of state constitutions. State constitutional analyses promoting expression on matters of public interest are themselves not always tied directly to discussions of specific fault standards. In some cases, they serve only to demonstrate a general state interest in protecting free debate.

A 1988 Wisconsin appeals court opinion, for example, states that "Wisconsin law has always favored free criticism and discussion of public issues, recognizing that the freedom of speech and . . . press are two of our most jealously guarded and basic constitutional rights."[41]

Even the U.S. Supreme Court has tenuously linked a general interest in protecting wide-open discussion on matters of public concern to state constitutions. Justice William Brennan's 1985 dissent in *Dun & Bradstreet v. Greenmoss Builders* opposed a plurality affirmation of damages in a defamation decision.[42] Justices Marshall, Blackmun and Stevens joined Brennen in calling for a broad and clear definition of exactly what kinds of expression deal with matters of public concern and in urging the Court to protect such speech to the fullest extent that the law permits.[43] Intentionally or not, a footnote to this dissent, which quotes a 200-year-old opinion of the Pennsylvania Supreme Court, offers federal support for viewing state constitutions as independent sources of protection for freedom of discussion on public issues:

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[41] Wiegel v. Capital Times Co., 15 Med.L.Rptr. 1569, 1572 (1988) (internal citations omitted). Article I, sec. 3 of the Wisconsin Constitution states in part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[42] 11 Med.L.Rptr. 2417 (1985).

> What then is the meaning of the bill of rights, and the Constitution of Pennsylvania, when they declare 'That the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?'. . . [T]hey give to every citizen a right of investigating the conduct of those entrusted with the public business. . ..[44]

Brennan's dissent posits discussion of government and politics within the realm of "public concern." The Supreme Court's 1964 *Sullivan* decision had in fact mandated substantial protection for such expression under the First Amendment to the Federal Constitution.[45] However, a number of state courts have suggested that public discussion of government and officials is highly privileged and protected independently under state constitutions.

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[43] *Id.* at 2428-38.

[44] *Id.* at 2429 (citing Respublica v. Oswald, 1 Dall. 343, 345 (1788). Article I, § 7 of the Pennsylvania Constitution states in part: "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

[45] 376 U.S. 254 (1964).

In the late 1970s, for example, the Tennessee Supreme Court indicated that the state has an independent constitutional interest in fostering critical examination of government, an interest which stems directly from the language in article I, section 19 of the state constitution:[46]

> While the law of libel has now been federalized . . . we consider the provisions of Tennessee's constitution to be both relevant and significant. . . . [T]his is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution in that it is clear and certain leaving nothing to conjecture and requiring no interpretation, construction, or clarification. . . . [It] requires that any infringement upon the free communication of thoughts and any stumbling block to the complete freedom of the press to examine the proceedings of any branch or officer of the government is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.[47]

In 1978, a California Supreme Court justice took a similar position in response to a majority opinion denying summary judgment to a citizen's group which had published and disseminated a newsletter critical of city government.[48] After quoting the free expression clause of the California Constitution, Justice Newman offered the following analysis in a dissenting opinion: "Was there abuse here? I think not, given the turmoil and strife and the long-built-up heat of the local election campaign."[49]

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[46] Article I, section 19 of the Tennessee Constitution states in part: "That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

[47] Press v. Verran, 4 Med.L.Rptr. 1229, 1234 (1978) (internal citations omitted).

[48] Good Government Group v. Superior Court, 4 Med.L.Rptr. 2082 (1978).

A New Jersey superior court in 1981 cited previous defamation decisions as evidence of a public policy reflecting a high judicial regard for political expression.[50] Furthermore, the opinion interprets the state constitution as consistent with this case law expression of public policy.[51] In this defamation action, the board of education in Weymouth Township, New Jersey, argued that the state constitution did not preclude its pursuit of a libel action against a local taxpayers' group and its members. The court disagreed:

> Although it is true that the New Jersey Constitution recognizes the responsibility which attaches to the right of free speech, such recognition does not militate against the public policy expressed in the case law previously cited. The right to criticize government has traditionally enjoyed a protection greater than that which exists in the dealings between one citizen and another.[52]

The court concluded that this right to criticize government, grounded in case law and consistent with constitutional interpretations, absolutely precludes libel suits by *governmental* entities.[53]

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[49] *Id.* at 2088. Article I, § 2 (a) of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[50] Weymouth Board of Education v. Wolf, 7 Med.L.Rptr. 1538, 1540 (1981).

[51] Article I, § 6 of the New Jersey Constitution states in part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

[52] 7 Med.L.Rptr. 1538, 1540 (1981).

Some courts have expanded the range of public concern topics that merit state constitutional protection beyond discussions of government and officials. In *Webb v. Fury*, the West Virginia Supreme Court of Appeals found that "[s]urface mining, and energy development generally, are matters of great public concern."[54] A court majority determined that a newsletter dealing with these issues was protected by the free speech guarantee in the state constitution.[55] Justifying its decision to prevent a county circuit court from pursuing a libel action based on the newsletter, the high court stated:

> [W]e shudder to think of the chill our ruling would have on the exercise of the freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation. This cost would be especially high were we to prohibit the free exchange of ideas on pressing social issues . . . .[56]

A dissenting opinion in *Vegod Corporation v ABC* suggested that the existence of a public controversy raised an additional barrier to a finding that freedom of expression was "abused" under the California Constitution.[57] Immediately after citing the California free speech clause,[58] Justice Newman wrote, "I think it is clear that inner-city 'close-out sales' in our era do inspire controversial concerns; and the 'landmark' character of the building here merely helped publicize those concerns and make them more newsworthy."[59]

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[53] *Id.* at 1538.

[54] 7 Med.L.Rptr. 1538, 1540 (1981).

[55] *Id.* Article III, § 7 of the West Virginia Constitution states in part: "No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties. . . provide. . . for the recovery in civil actions, by the aggrieved party, of suitable damages for. . . libel, or defamation."

[56] 7 Med.L.Rptr. 1538, 1540 (1981).

This sampling of opinions shows how courts have used the free expression clauses in state constitutions to support a general rationale promoting heightened protection for speech on matters of public interest and concern. As the following opinions demonstrate, however, jurists have at times articulated more precise state constitutional analyses in defamation actions dealing with expression on matters of public concern. Specifically, the New Jersey, Indiana, Colorado and New York judiciaries have suggested that defamation plaintiffs must prove higher standards of fault when a defamation case involves matters of public concern. Courts in these states have directly linked adoption of such standards to the free speech and press provisions of their respective state constitutions.

Two decisions of the New Jersey Supreme Court in 1986 established clearly the state's intent to protect free discussion on all matters of public interest under the common law privilege of fair comment and the state's constitutional commitment to freedom of expression.[60] The court in *Dairy Stores v. Sentinel Publishing* affirmed summary judgment for a newspaper defendant based on the fair comment common law privilege.[61] A court majority determined that statements of fact and opinion on topics of legitimate public concern (in this instance the alleged presence of chlorine in bottled drinking water) are protected unless a defamation plaintiff can show they were made with actual malice.[62] The court saw the nature of the expression—not the plaintiff's status (public or private) or the defendant's status (media or non-media)—as the threshold determination in this case. Significantly, the justices linked their endorsement of this heightened protection for expression on public issues to the New Jersey Constitution, which "provides broader free-speech rights than [the] federal constitution."[63]

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[57] 5 Med.L.Rptr. 2043, 2046 (1979).

[58] *See supra* at note 49.

[59] 5 Med.L.Rptr. 2043, 2046 (1979).

New Jersey's highest court handed down a related and more detailed state constitutional analysis on the same day. In *Sisler v. Gannett* the court ruled that a former bank president, although not a public figure, was required to demonstrate that newspaper articles had been published with actual malice, simply because he had "voluntarily and knowingly risked exposure on subject matter of legitimate public concern."[64] The court went on to suggest that the text and interpretive history of the state free expression/libel provision supported application of this protective standard:

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[60] *See supra* at note 51.

[61] 13 Med.L.Rptr. 1594 (1986).

[62] *Id.*

[63] *Id.* at 1600. *See also supra* at note 51.

> This provision, more sweeping in scope than the language of the First Amendment, has supported broader free speech rights than its federal counterpart. . . . Thus our decisions, pronounced in the benevolent light of New Jersey's constitutional commitment to free speech, have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern.[65]

Implying that its actions were compatible with the judicial system of federalism, the court acknowledged the independent nature of its decision with the following observation:

> [I]n contradistinction to the federal view, we do not deem it unfair to favor free speech over the reputational interests of an individual who has voluntarily and knowingly engaged in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny.[66]

Indiana's judiciary, like that of New Jersey, has buttressed an actual malice fault requirement for private figures enmeshed in public issues with expansive interpretations of state constitutional safeguards for speech and press. In a relatively recent line of cases, Indiana courts have followed this standard as a matter of state constitutional law. The state's perception of its constitution as an authoritative source of law in defamation litigation was evident in a 1983 U.S. District Court's decision granting summary judgment to a newspaper defendant.[67] Calling the textual sweep of the state speech and press clause "every bit as broad" as the First Amendment, the court said Indiana's constitutional protection of freedom of expression "constitutes significant and relevant substantive law to be followed by this court. . . ."[68] This law, the court concluded, "requires that the interchange of ideas upon all matters of general or public interest be unimpaired."[69]

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[64] 13 Med.L.Rptr. 1577 (1986).

[65] *Id.* at 1582-83.

[66] *Id.* at 1584.

Through the 1980s, a number of comparable district court decisions in Indiana were based independently on the state constitution.[70] Moreover, an appeals court in 1992 indicated that Indiana courts have held that "it makes no sense to draw the distinction between 'public' officials or figures and 'private' individuals in terms of defining the [state] constitutional guarantees of free speech and press."[71] The ramifications of this rationale grant defamation defendants consequential state protection from libel suits brought by public and private plaintiffs alike. This protection has been directly applied to media defendants:

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[67] Gintert v. Howard Publications, 9 Med.L.Rptr. 1793 (1983).

[68] *Id.* at 1800. Article 1, § 9 of the Indiana Constitution states: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

[69] 9 Med.L.Rptr. 1793, 1800 (1983) (quoting Aafco Publications, Inc. v. Northwest Publications, Inc., 321 N.E. 2d 580, 1 Med.L.Rptr. 1683 (1974).

[70] *See, e.g.*, Fazekas v. Crain Communications, 10 Med.L.Rptr. 1513 (1984); Woods v. Evansville Press, 11 Med.L.Rptr. 2201 (1985); Chang v. Michiana Telecasting Corp., 14 Med.L.Rptr. 1889 (1987).

[71] Henrichs v. Pivarnik, 20 Med.L.Rptr. 1787, at 1791 n.3 (1992).

> Indiana law affords the same [state] constitutional protection to newspapers with regard to defamation actions brought by 'private' figures as are required by United States Supreme Court mandate with regard to defamation actions brought by 'public' officials or figures.[72]

Colorado courts, while not willing to dismiss a defamation plaintiff's status as irrelevant, have nonetheless linked adoption of a malice standard of fault in defamation actions involving matters of public concern to the state constitution. In *Diversified Management v. Denver Post,* the Colorado Supreme Court indicated that independent judicial interpretations of the state free expression provision[73] require private plaintiffs who are discussed within the context of public issues to show actual malice with "clear and convincing clarity" in order to win a defamation suit.[74]

A Colorado district court followed suit in *Hannon v. Timberline Publishing, Inc.,* in granting a media defendant's motion for summary judgment.[75] Citing specifically the state's heightened standard of protection for expression on matters of public concern, the court determined that the newspaper article in question was protected speech under both state and federal constitutional speech and press provisions.[76]

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[72] *Id.*

[73] Article II, § 10 of the Colorado Constitution states in part: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty. . . ."

[74] 8 Med.L.Rptr. 2505, 2509 (1982). *See also id.* at 2512 (A dissenting opinion disagreed with the court's endorsing "a stricter standard for freedom of the press [under] the Colorado Constitution than exists in the United States Constitution.").

The Louisiana Court of Appeal, First District, in 1992 offered evidence that Louisiana too has de-emphasized the public/private figure distinction for plaintiffs and embraced the actual malice fault standard when a defamation action encompasses matters of public concern:

> [A] newspaper article concerning alleged financial irregularities at a public hospital involves [a] matter of public concern, and thus [the] accounting firm which alleges that it was defamed by [the] article must demonstrate malice, regardless of whether [the] firm is [a] public or private figure.[77]

In this instance, the Louisiana court's recognition of the standard appears to be based on both state constitutional and common law interpretations.[78]

New York has developed its own heightened standard of fault to safeguard unbridled debate on matters of public concern. Private figure plaintiffs are required to show that media defamation defendants acted with gross irresponsibility to win public concern defamation cases. New York courts have grounded adoption of the gross liability standard, which lies somewhere between the ordinary negligence and actual malice fault standards, in the free press/libel provision of the state constitution.[79]

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[75] 19 Med.L.Rptr. 1244, 1245 (1991).

[76] *Id.* at 1247.

[77] Neuberger, Coerver & Goins v. The Times Picayune Publishing Co., 20 Med.L.Rptr. 1123 (1992).

[78] *Id.* at 1125-26. Article I, § 7 of the Louisiana Constitution states: "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for the abuse of that freedom."

An appellate court opinion shows how judicial application of the gross negligence standard has affected litigation in New York. Ruling in favor of a newspaper defendant, the court in *Virelli v. Goodson-Todman Enterprises Ltd.* reasoned as follows:

> As a matter of State constitutional law, plaintiffs' allegations, couched exclusively in terms of ordinary negligence . . . [and] all pertaining to matters of public concern, are patently insufficient . . . . [The U.S. Supreme Court] expressly left to the individual states the decision whether to impose a higher standard of culpability. New York has done so, requiring establishment in such cases that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties.[80]

Another New York case reveals the judicially recognized limitations on the gross negligence standard. In *Weiner v. Doubleday & Co.*, a defamation plaintiff argued that published statements accusing him of using his position as a psychiatrist to carry on a sexual relationship with a patient were not protected under the New York Constitution[81] as privileged speech on matters of public issue, public controversy, public concern or public interest.[82] The court agreed and granted the plaintiff's motion for summary judgment. He had, the court decided, shown by a preponderance of the evidence that the investigative research done by the defendants which led to the libelous statements was conducted in a grossly irresponsible manner.[83]

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[79] For additional New York court analyses of the gross negligence standard *see* cases discussed *infra* at notes 131 to 136 and accompanying text.

[80] 15 Med.L.Rptr. 2447, 2450-51 (1989) (internal citations omitted). *See also*, Virelli v. Goodson-Todman Enterprises Ltd., 18 Med.L.Rptr. 1111-1112 (1990) (same court reiterates the state constitutional basis for the gross negligence standard).

Opinions Finding No Special State Constitutional Protection for Expression on Matters of Public Concern

In stark contrast to the expression-protective judicial analyses examined above are opinions containing independent state constitutional interpretations which serve to limit the development and judicial recognition of heightened legal insulation for speech on matters of public concern, particularly in defamation actions involving private figure plaintiffs. The following opinions demonstrate how state constitutional interpretations have been used to justify a negligence standard when a private plaintiff defamation case arguably involves a matter of public interest or concern.

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[81] Article I, § 8 of the New York Constitution states in part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[82] 14 Med.L.Rptr. 2107, 2108 (1987).

[83] *Id.* at 2110.

The Florida Supreme Court left little doubt concerning its position on this issue in *Miami Herald v. Ane*:[84]

> Negligence, rather than actual malice, is (the) appropriate standard of liability to be applied in libel actions brought by private figures, even if allegedly defamatory statements involved matters of public or general concern.[85]

Florida's highest court found application of a negligence standard justified in light of the state's concern for reputation set out in the state constitution.[86]

The Oregon Supreme Court, when confronted with the same issue in *Bank of Oregon v. Independent News*,[87] offered a more detailed explanation for a state constitutional approach that does not recognize a heightened standard of liability in private individual defamation actions involving matters of public concern:

> A tension exists [within the Oregon Constitution] between the right to communicate on any subject whatever and the abuse of this right.[88] There is no basis under the Oregon Constitution to provide more protection to certain non-abusive communication based upon the content of the communication. Speech related to political issues

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[84] 10 Med.L.Rptr. 2383 (1984).

[85] *Id.* at 2383.

[86] *Id.* at 2384. Article I, section 4 of the Florida Constitution states in part: "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain of abridge the liberty of speech or of the press."

[87] 11 Med.L.Rptr. 1313 (1985).

[88] Article I, section 8 of the Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

> or matters of "public concern" is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right.[89]

An additional rejection of the public interest rationale based upon a state constitutional interpretation appeared in *Newell v. Field Enterprises.*[90] In this private figure defamation action, an Illinois appellate court opinion noted that the state supreme court's 1975 adoption of a negligence standard of liability largely was based upon the "responsible for abuse" caveat in the state constitutional expression provision.[91] Following its own case law analysis of the boundaries of state and federal constitutional protections for speech and press, the appellate court found that "no constitutional privilege exists for neutral reporting of newsworthy matters or matters involving public issues, personalities, or public programs."[92]

Gazette v. Harris (1985) raised the additional question of defendant status within the context of another private figure/state constitutional negligence analysis.[93] Here the

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[89] 11 Med.L.Rptr. 1313, 1315 (1985).

[90] 6 Med.L.Rptr. 2451 (1980). *See also*, Sisemore v. U.S. News, 14 Med.L.Rptr. 1590 (1987) (U.S. District Court in Alaska, noting state's demonstrated constitutional and judicial interest in protecting reputation, found that the "(a)ctual malice standard does not apply to comment on matters of public concern involving persons who are not public figures." (*Id.* at 1590).).

[91] 6 Med.L.Rptr. 2451, 2460 (1980). Article I, section 4 of the Illinois Constitution states in part: "All persons may speak write and publish freely, being responsible for the abuse of that liberty."

[92] 6 Med.L.Rptr. 2451, 2463 (1980).

[93] 11 Med.L.Rptr. 1609 (1985).

Virginia Supreme Court considered whether a negligence standard is appropriate in defamation suits pitting private plaintiffs against media defendants. The newspaper defendant in this case argued that the public service function of mass media warrants a higher level of protection for expression. However, a Virginia Supreme Court majority stated that adoption of the negligence standard would "not result in self-censorship, as the media defendants argue, and that the duty of reasonable care is an acceptable burden for the press to bear."[94] Characterizing the "responsible for abuse" language in the state constitutional freedom of expression provision as especially relevant, the court further reasoned that private individuals are more vulnerable to reputational injury than public figures and public officials.[95] This analysis led the court to adopt the negligence standard in private plaintiff/media defendant scenarios as promoting "the proper balance between the rights of the news media and the rights of private individuals."[96]

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[94] *Id. at* 1614.

[95] Article I, section 12 of the Virginia Constitution states: "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

[96] 11 Med.L.Rptr. 1609, 1614 (1985). *But see, id.* at 1633-34 (Opinion concurring in part and dissenting in part argues for "gross negligence" standard in compensatory-damage claims. In opposing application of the negligence standard, Justice Poff reasoned that "a rule which makes publishers liable for simple negligence weakens

Part Three: State Constitutional Protection and Regulation of Opinion

Like the debate over granting special protection for expression on matters of public concern, the issue of constitutional protection for opinion is a major area of judicial disagreement in modern defamation litigation. The U.S. Supreme Court's 1990 decision in *Milkovich v. Lorain Journal Co.*[97] challenged more than 15 years of pervasive judicial recognition that statements of pure opinion were not actionable for defamation.[98] The *Milkovich* Court abandoned the concept of First Amendment immunity for any statements that might be categorized as opinion and, in fact, appeared to reject the constitutional distinction between opinion and fact.[99] The Court decided that only statements of opinion on issues of public concern which do not contain a provably

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Virginia's historical commitment to freedom of the press and encumbers the right of the people to learn what they need to know to govern themselves wisely."). *See also*, Keane v. Gannett, 12 Med.L.Rptr. 2252 (1986) (U.S. District Court of Hawaii stated that freedom of expression provisions in Hawaii Constitution have been authoritatively interpreted as granting the same level of protection for both media and private defendants. It is the plaintiff's status that determines whether a negligence or actual malice standard of fault applies. *Id.* at 2253. Article I, section 4 of the Hawaii Constitution states: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

[97] 497 U.S. 1, 110 S.Ct. 2695 (1990). For additional analysis of *Milkovich* and the current status of constitutional protection for opinion *see supra* at notes 32 to 39 and *infra* at notes 98 to 144 and accompanying text.

[98] *See, e.g.*, Keohane v. Wilkerson, 21 Med.L.Rptr. 1417, 1418 (1993).

[99] *Id.* at 1419.

false factual connotation, or cannot be reasonably interpreted as stating actual facts about an individual, continue to receive full constitutional protection.[100]

Heightened Protection for Opinion Under State Constitutions

Some state courts have balked at the *Milkovich* analysis, perhaps because they saw in the decision evidence of retrenchment in federal protection for opinion. In fact, both prior to and since the *Milkovich* decision, some jurists have employed state constitutional analyses as a means to raise the "federal floor" of protection for opinion. The independent tenor and intent of such interpretations is clear.

A 1987 Connecticut decision granting summary judgment for a newspaper is a case in point. In *Dow v. New Haven Independent*, the Connecticut Superior Court in New Haven prefaced its independent analysis by stating that the state constitution goes further than the federal constitution in protecting opinion.[101] "In construing our state charter of liberties," added the court, "we must put to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. . . ."[102] Quoting an earlier state court ruling, the court continued: "We . . . are free in appropriate circumstances to follow a different route and thus to recognize that the Connecticut constitution may provide for the people of this state greater rights and liberties."[103] This preamble paved the way for an independent interpretation of state protection for opinion rooted in state constitutional law:

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[100] 497 U.S. 1, at 20, 110 S.Ct. 2695, at 2706 (1990).

[101] 14 Med.L.Rptr. 1652, 1658 (1987).

[102] *Id.*(at 1658) (internal citation omitted).

> Because of our profound commitment to freedom of the press as demonstrated in Sections 4 and 5 of Article first of the Constitution of the State of Connecticut and the history of this state, at the very least, statements in editorials (clearly labeled as such) about public officials concerning matters of public concern . . . are entitled to an absolute, unconditional privilege. The adoption of an absolute privilege under our state constitution for such editorial writings strikes the necessary balance between a free press unfettered by the threat of litigation and the reputation of the public official which can be adequately protected in the public forum he or she commands.[104]

Two Ohio court decisions arising from a high school wrestling match reflect that state's efforts to develop a separate state constitutional protection for opinion that is not limited to labeled editorials about public officials. In 1974, a sports reporter's column printed in a local newspaper accused a school superintendent and a wrestling coach of lying at a hearing held by the Ohio High School Athletic

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[103] 14 Med.L.Rptr. 1652, 1658 (1987) (quoting State v. Flemming, 198 Conn. 255, 261 (1986). Article I, sections 4 and 5 of the Connecticut Constitution state: "[4] Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty. [5] No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

[104] 14 Med.L.Rptr. 1652, 1658 (1987).

Association. State officials called the hearing to investigate a fracas that erupted during a wrestling match after a referee made a controversial call against the host team. The Ohio Supreme Court in 1986 determined that the newspaper article was protected opinion under Section 11, Article I of the Ohio Constitution[105] as a proper exercise of freedom of the press.[106] In a separate case arising from the same article, the Ohio Court of Appeals in 1989 reached the same conclusion.[107]

Courts in Ohio and Connecticut have laid foundations for the continued development of expanded protection for opinion under state constitutions. However, a series of at least 10 decisions by the New York judiciary since 1991 has created a broad privilege for opinion in that state. Based on independent interpretations of the state constitution,[108] New York now safeguards opinion at a level above that mandated by current federal law. The catalyst case in this line of decisions was *Immuno A.G. v. Moor-Jankowski*.[109] Due to its seminal and illustrative significance, the case warrants detailed analysis.

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[105] Section 11, article I of the Ohio Constitution states in part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

[106] Scott v. News Herald, 13 Med.L.Rptr. 1241, 1242 (1986). This case, and related defamation actions brought by coach Michael Milkovich, have protracted and complex judicial histories. The litigation led eventually to the U.S. Supreme Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695 (1990), which found the article to be a false assertion of fact not protected by the First Amendment.

[107] Milkovich v. The News-Herald, 17 Med.L.Rptr. 1309, 1312 (1989).

[108] *See supra* at note 81.

In January, 1991, the Court of Appeals of New York cited the state's "exceptional history and rich tradition" of safeguarding liberty of the press and concluded that a media defendant's motion for summary judgment in a libel case was properly granted on independent state constitutional grounds.[110] This ruling was necessary only because the state court's judgment in the same case a year earlier, which was grounded in the core freedom of expression values protected by both the state and federal constitutions,[111] had been reviewed and vacated by the U.S. Supreme Court.[112] The case was remanded for further proceedings.

The seven New York judges dutifully complied with the Supreme Court's remand instructions.[113] But the state's highest court then turned to a state law analysis and embellished its majority opinion with the assertion that the New York judiciary recognizes a broad and general constitutional protection for freedom of the press which extends well beyond the minimum levels required by the First and Fourteenth Amendments to the U.S. Constitution.[114]

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[109] 567 N.E.2d 1270, 18 Med.L.Rptr. 1625 (1991).

[110] 567 N.E.2d 1270, 1278, 18 Med.L.Rptr. 1625, 1631 (1991).

[111] 74 N.Y.2d 548, 560, 549 N.E.2d 129, 135 (1989).

[112] 110 S.Ct. 3266 (1990).

[113] The U.S. Supreme Court's remand instructions and their consideration by the Court of Appeals of New York are discussed *infra* at notes 117 to 124 and accompanying text.

The libel action in *Immuno* was prompted by a letter to the editor published in the *Journal of Medical Primatology* in 1983. The letter, written by Dr. Shirley McGreal of the International Primate Protection League, was critical of a plan by the Immuno A.G. Corporation to conduct hepatitis research using chimpanzees. Immuno brought a lawsuit against eight defendants. Seven defendants settled with the corporation out of court. Dr. J. Moor-Jankowski, editor of the scientific journal, did not.

In 1989 the case first came before the Court of Appeals of New York, which held that all of the comments attributed to Moor-Jankowski were expressions of opinion that could not support a legal action for defamation.[115] The court arrived at this decision through an application of New York law, which stipulated that the initial determination of whether an allegedly defamatory statement constitutes an actionable assertion of fact or a protected expression of opinion should focus upon the tone, content, and apparent purpose of the communication as viewed in context.[116] A year later the state court, in accordance with the Supreme Court's remand directions, reconsidered its *Immuno* ruling in light of the intervening decision in *Milkovich v. Lorain Journal Co.*[117] The New York court first analyzed *Milkovich* and determined that the decision struck the following balance between protection for individual reputation and First Amendment protection for media defendants: "except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[118] The court then applied its interpretation of *Milkovich* to the facts in *Immuno* and held that its original decision to grant defendant's motion for summary judgment had been proper.[119] The court majority concluded that since no triable issue of fact was revealed through the contextual analysis required under New York law, it was not necessary to apply the U.S. Supreme Court's *Milkovich* standard and examine specific, challenged statements for express and implied factual assertions.[120]

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[114] *See generally*, Brennan, *supra* note 12 at 550.

[115] 74 N.Y.2d 548 (1989).

[116] 567 N.E.2d 1270, 1271 (1991). *See also* Steinhilber v. Alphonse, 13 Med.L.Rptr. 1562 (1987) (The *Steinhilber* court articulated the basic analytical formula for distinguishing fact from opinion in New York which the state has since used to define the scope of state constitutional protection for opinion: 1) whether the specific language at issue has a precise meaning readily understood or is indefinite and

The New York court offered the following justification for its actions:

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ambiguous, 2) whether it is capable of being objectively viewed as true or false, 3) consideration of the full context of the communication in which the statement is made, and 4) consideration of the broader social context surrounding the communication, including the existence of any applicable customs or convention which might alert the reader that he or she is reading opinion and not fact).

[117] 497 U.S. 1, 110 S.Ct. 2695, 17 Med.L.Rptr. 2009 (1990).

[118] 567 N.E.2d 1270, 1275 (1991).

[119] *Id.* at 1277.

[120] *Id.* at 1271.

> The Supreme Court has specifically directed us to consider the case in light of *Milkovich*, and we comply with that direction. . . . But that does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an alternative basis for resolving the case. . . . We therefore proceed to resolve the case . . . independently as a matter of state law. . . .[121]

The court majority shielded its decision from further Supreme Court review, stating plainly[122] that "we decide this case on the basis of State law independently, and . . . our state law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach."[123] A concurring opinion further explained the general judicial theory driving such independent state court activity: "Under our system of federalism, the state courts have both the privilege and the responsibility of enunciating the state's law and providing the first line of protection for the people's liberties."[124]

In some respects, *Immuno* represents a "model" independent state court decision. From a policy perspective, it was certainly one of the most obvious examples to date of a state employing the revitalized federalism or states' rights approach in an effort to create a local climate of vigilance and deference for the freedom of expression ideals associated with state constitutions. More specifically, the ruling underscores the New York judiciary's dissatisfaction with the U.S. Supreme Court formula for distinguishing fact from opinion. The *Immuno* court characterized the federal approach as myopic in that it requires the "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' [which] loses sight of the objective of the entire exercise, which is to assure that. . . the cherished constitutional guarantee of free speech is preserved."[125]

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[121] *Id.* at 1279-80.

[122] The presence of such a statement is significant in cases where rulings are rooted in state law. The U.S. Supreme Court in Michigan v. Long, 463 U.S. 1032 (1983), indicated that when a state court opinion includes a "plain statement" indicating that the ruling is properly based on bona fide separate, adequate and independent state grounds, the decision will be shielded from federal review. *Id.* at 1041.

[123] 567 N.E.2d 1270, 1278 (1991). *But see id.* at 1279 (In one seemingly contradictory statement in the majority opinion, Judge Kaye indicates that because of the remand instructions by the U.S. Supreme Court, the *Immuno* decision rests on both Federal *and* independent state constitutional grounds).

[124] *Id.* at 1287.

From a procedural perspective the ruling also was noteworthy. In reaching its decision, the *Immuno* majority said it considered the textual differences between the state and federal press clauses,[126] the "original intent" and timing surrounding the adoption of the state provision,[127] and New York's own history and tradition of fostering press freedom.[128] Judiciaries in other states could likely develop one or more of the same issues to generate authoritative support for their own independent state constitutional interpretations. Courts so inclined might also give weight to

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[125] *Id.* at 1282.

[126] *Id.* at 1277.

[127] *Id.*

[128] Id. at 1278.

"helpful" opinions from sister jurisdictions with textually similar constitutional provisions, similar constitutional histories, or similar "historical traditions" of protection for expressive freedoms.[129] Finally, the *Immuno* majority posited its ruling within the larger context of the system of federalism and made clear the independent grounds for its decision, a tactic clearly intended to insulate the ruling from federal review.[130]

While any future significance of *Immuno* for other jurisdictions is unclear, the New York courts wasted little time confirming and refining the precise legal nature of this heightened protection for opinion rooted in the state constitution.[131] In *Behr v. Weber*, for example, a state court suggested that in contrast to U.S. Supreme Court First Amendment interpretations, New York had developed a separate state constitutional exemption for statements of opinion relating to matters of public concern.[132] A 1992 opinion offered a similar public concern analysis in dismissing a libel action against non-media defendants:

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[129] *See, e.g.*, Dworkin v. L.F.P. Inc., 20 Med.L.Rptr. 2001, 2007 (1992).

[130] 567 N.E.2d 1270, 1278 (1991).

[131] *See e.g.*, Silver Screen Management Services Inc. v. Forbes Inc., 19 Med.L.Rptr. 1744 (1991); Gross v. The New York Times Co., 18 Med.L.Rptr. 2362 (1991) (Allegedly defamatory statements found to be opinion protected by New York Constitution). *See also*, Lesyk v. Putnam County News and Reporter, 18 Med.L.Rptr. 1618 (1990) (A forerunner to the *Immuno* decision which seems to anticipate development of an independent state constitutional basis for protecting opinion).

[132] 18 Med.L.Rptr. 2237, 2238 (1991).

> [T]he writings at issue are, in part, constitutionally protected as assertions of fact on a matter of public concern, which have not been shown to be provably false, or, as to the remainder, protected opinion under New York State law.[133]

A state court decision in 1992 reflected both the broad nature of state constitutional protection for opinion and the independent attitude of the New York judiciary:

> The [U.S.] Supreme Court has . . . restricted the concept of absolutely protected pure opinion in federal jurisprudence. [New York's highest court] has declined to adopt this development in the federal law in its interpretation of the New York State Constitution.[134]

More contemporary articulations of the opinion privilege in New York have characterized the state's constitutionally mandated procedure for assessing potentially libelous communication as a "content, tone and purpose" analysis.[135] Recent New York case law suggests that this analytical technique is highly protective of defamation defendants who have engaged in robust debate on matters of public interest

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[133] McGill v. Parker, 19 Med.L.Rptr. 2170, 2176 (1992).

[134] Gross v. The New York Times Co., 20 Med.L.Rptr. 1274, 1275 (1992). *But see*, Gross v. The New York Times Co., 21 Med.L.Rptr. 2142 (1993) (New York Court of Appeals, while maintaining that the state constitution offers broad protection for opinion, reversed the lower court's summary judgment for defendant in Gross v. The New York Times Co., 20 Med.L.Rptr. 1274 (1992). The Court of Appeals reasoned that the disputed statements were not opinion and contained assertions that would be understood by a reasonable reader as factual. 21 Med.L.Rptr. 2142 (1993).).

[135] *See, e.g.*, 600 West 115th Street Corp. v. Von Gutfeld, 21 Med.L.Rptr. 1811, 1818 (1993) (Reversing lower court's denial of summary judgment for defamation defendant); Polish American Immigration Relief Committee v. Relax, 21 Med.L.Rptr. 1818, 1820 (1993) (Modifying lower court's decision by granting defamation defendants' cross-motion for summary judgment).

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and/or whose communication appears in forums traditionally associated with expressions of opinion.[136]

Some states have raised the level of protection of expression through independent state constitutional analysis and interpretation. Most have not. And at least one state appears to have dismissed completely the proposition that opinion merits separate protection under the state constitution.

No Special Protection for Opinion Under State Constitutions

In *Weller v. American Broadcasting Companies, Inc.*, a California appeals court had to decide whether broadcast statements concerning a defamation plaintiff's sale of an antique candelabra to a museum were defamatory.[137] The defense argued that the statements in question were protected opinion under federal constitutional law. The court concluded they were not, a possibility the defense had anticipated. Thus a second line of defense urged the court to construe the California Constitution to extend even greater protection for this type of speech than does the First Amendment.[138] The court instead indicated that a 1989 decision of the California Supreme Court[139] refuted policy arguments in favor of expanding state constitutional protection for defamation defendants.[140] As a result, the appellate court stated plainly that the "California Constitution does not provide any greater protection for speech alleged to be 'opinion' or 'conjecture' than that provided under the First Amendment."[141] In declining to recognize a separate state constitutional protection for opinion, the court suggested that "free debate on issues of public concern is adequately protected by the combination of this state's common law privilege [of fair comment] and the constitutional protections enumerated in *Milkovich*."[142]

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[136] *See, e.g.*, 21 Med.L.Rptr. 1811 (1993); 21 Med.L.Rptr. 1818 (1993).

[137] 19 Med.L.Rptr. 1161 (1991).

[138] *Id.* at 1167.

[139] Brown v. Kelly Broadcasting Co., 16 Med.L.Rptr. 1625 (1989).

The California judiciary's position on state constitutional protection for expression was further articulated in 1991. In *Kahn v. Bower*, an appellate court rejected the idea of an independent categorical exemption for opinion under the state constitution and expressed doubt that the state will recognize such protection in the future: "We find no support for this proposition. . . . Nor is it likely that such a rule will be adopted under article I section 2 of the California Constitution."[143]

Critical analysis of the fact/opinion issue makes it clear that "there remain many unanswered questions and areas of uncertainty in this developing field of libel law."[144] Several states have entered the fray and shielded opinion under their state speech and press provisions. Most have not adopted this approach and seem willing to continue litigating opinion cases utilizing some combination of state common law and federally-enunciated principles.

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[140] 19 Med.L.Rptr. 1161, 1167-68 (1991).

[141] *Id.* at 1161.

[142] *Id.* at 1166 n.12.

[143] 19 Med.L.Rptr. 1236, 1239 n.2 (1991). *See also supra* at note 49.

Part Four: Summary

Parts two and three examined the 41 decisions most relevant to this study.[145] The case law analysis yielded the following summary data:

Twenty cases contained opinions supporting an independent state constitutional protection for discussion on matters of public concern.[146] Most of these opinions argue, successfully, that expression on issues of public importance warrants vigorous legal guardianship, regardless of a defamation plaintiff's public or private status. As a consequence, the constitutionally-based protection delineated in these opinions often promotes a liability standard for private figure plaintiffs who are enmeshed in matters of public concern which is more protective of defamation defendants than is required under federal law.

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[144] 21 Med.L.Rptr. 2142, 2144 (1993).

[145] Of the approximately 3,000 defamation cases examined over the course of this research, 203 (6.7%) contain at least one judicial reference to state constitutional freedom of expression provisions. Sixty-seven of these 203 cases (33%) involved analysis of constitutional protection for expression on matters of public concern and/or opinion, and 41 (20.1%) of these 203 cases reflect independent state constitutional analysis of these particular defamation issues. These 41 cases were the focus of this study, and they represent about 1.36% of the total number of defamation decisions published in Media Law Reporter from 1977 through 1993.

[146] Case citations and discussion appear *supra* at notes 41 to 83 and accompanying text.

Of these 20 cases, 12 were decided since 1985–four since 1990. Seven are state supreme court decisions, seven are lower state court decisions, five are district court decisions, and one is a U.S. Supreme Court decision. Courts in Indiana most frequently turned to an analysis of state constitutional law for protecting discussion of public issues (five cases), while New Jersey and New York courts have done so at least three times each.[147]

Six contrasting opinions suggested that independent state constitutional protection for expression on matters of public concern, if it exists at all, does not mandate greater protection for defamation defendants when plaintiffs are private figures.[148] Almost invariably, these opinions cited the "responsible for abuse" language in various state speech and press clauses as a compelling constitutional argument for ensuring that private defamation plaintiffs receive the maximum protection for reputation permitted under existing federal law. Under these analyses, private plaintiffs warrant insulation from defamatory attacks on reputation regardless of whether or not they are embroiled in matters of public concern.

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[147] Additional opinions of this type by jurisdiction were: California, 2 cases (both dissents); Colorado, 2 cases; Louisiana, 1 case; Tennessee, 1 case; West Virginia, 1 case; Wisconsin, 1 case.

[148] Case citations and discussion appear *supra* at notes 84 to 96 and accompanying text.

Each of these six opinions came from different state judiciaries. Three are state supreme court opinions, one each from Florida, Oregon and Virginia. District courts in Alaska and Hawaii and a lower court in Illinois were responsible for the additional three opinions. All six opinions appeared in defamation decisions from 1980 to 1987. State constitutional interpretations promoting heightened protection for reputation are sporadic and geographically scattered. It appears that such analyses surface in defamation litigation on a case-by-case basis, primarily to reinforce the basic theoretical premise driving defamation law: that individuals should be protected by law from defamatory attacks on reputation.

State courts suggested that heightened protection for opinion exists under state constitutions in 13 cases examined in this study: one from Connecticut (lower state court), two from Ohio (one state supreme court and one lower state court), and 10 from New York (three state high court and seven lower state court).[149] The Connecticut and Ohio cases were decided from 1986 to 1989. All 10 New York opinions appear in cases decided since 1990. The New York decisions are distinguished in that they move beyond analyses of liability standards and plaintiff status to collectively establish a broad protection for expressions of opinion that ostensibly is based upon judicial interpretation of the state constitution's freedom of expression clause.

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[149] Case citations and discussion appear *supra* at notes 101 to 136 and accompanying text.

Only two cases were found in which a court rejected outright the idea that a state constitution offers independent protection for opinion.[150] Both cases were decided by California appellate courts in 1991.

Several additional observations may be useful in putting the proceeding categorical examination of case law in perspective. First, judicial analysis of state constitutional law in defamation contexts usually includes references to the legislative and/or interpretive history of the state speech and press provisions themselves. Such analyses can accommodate disparate theoretical positions. Moreover, the texts of these state freedom of expression clauses—each textually different from the federal First Amendment—no doubt facilitates such diversity. Each of the 50 state constitutions contains one or more provisions intended to safeguard expressive liberties. Many refer also to limitations on speech and press freedoms, usually in the form of a clause holding individuals responsible for the abuse of their expressive freedoms. All but five state constitutions include phrases in their freedom of expression clause(s) concerning defamation litigation procedures and/or standards.[151]

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[150] Case citations and discussion appear *supra* at notes 137 to 143 and accompanying text.

In summary, it appears as if the potential exists for states to continue modifying defamation standards and litigation using independent state constitutional analysis and interpretation. Through 1993, unsettled defamation issues involving protection for discussion of matters of public concern and opinion have induced a limited and localized yet significant line of decisions grounded in state constitutional law. This state constitutional approach to defamation litigation has gained momentum in recent years. It is particularly apparent in a line of decisions offering increased protections for defamation defendants. Courts in Indiana, New Jersey, New York and Ohio have been the most active to date in this respect.

Realistically, however, it is difficult to predict the future of independent state constitutional analysis in defamation jurisprudence. State activity is restricted to those areas not completely preempted by federal constitutional law, and the U.S. Supreme Court may yet decide that uniformity, not state diversity, is the cure for what ails defamation litigation.

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[151] *See, e.g.*, the texts of state provisions *supra* at notes 41, 44, 46, 49, 51, 55, 68, 73, 78, 81, 86, 88, 91, 95, 96, 103, and 105.

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The President John F. Kennedy Assassination Records Collection Act of 1992: Will Sun Finally Shine Over Dealey Plaza

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Presented at the 1994 AEJMC National Convention August 10-13, Atlanta

ABSTRACT

The President John F. Kennedy Records Collection Act of 1992 was designed to create "an enforceable, independent, and accountable process for the public disclosure" of all government-held documents related to the Kennedy assassination. Congress intended the Act allow for the timely release of all materials, correcting the failure of the Freedom of Information Act to provide full disclosure about the event. New information has emerged, but implementation of the Act has been, at best, spotty. Agency compliance is difficult to measure because President Clinton delayed appointing key officials to monitor the release of documents. In addition, the Act raises legal questions concerning executive privilege and separation of powers that could threaten its effectiveness. Lower courts are now deciding whether the Act supersedes FOIA. While the final impact of the Act remains unclear, the measure to date clearly has not met its goal of the expeditious release of all assassination records.

I. INTRODUCTION

From the moment an assassin's bullet struck John Kennedy on November 22, 1963, the American public rushed to television sets, gathered around radios, grabbed newspapers, and talked with friends and family in a quest to gather every morsel of information possible about the event. The public's insatiable interest in the events that took place in Dallas' Dealey Plaza that Friday did not end when Kennedy was buried in Arlington National Cemetery three days later or when the Warren Commission in 1964 concluded that gunman Lee Harvey Oswald solely was responsible for the president's death.[1] Public interest has not waned and perhaps has even grown more intense during the 30 years since Kennedy's death. Hundreds if not thousands of articles, books, broadcast programs, and reports on the assassination appear every year,[2] all attracting public attention.[3] But few treatments of the event generated the level of interest as Oliver Stone's 1991 film, "JFK,"[4] which refocused national attention on the assassination and underscored the amount of government information still sealed from the public.

The movie served as the "major impetus"[5] for the passage of the President John F. Kennedy Assassination Records Collection Act of 1992, signed into law by George Bush on October 26.[6] The

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[1] *Senate Committee on Governmental Affairs, The Assassination Materials Disclosure Act of 1992*, S. REP. NO. 721, 102nd Cong., 2nd Sess. 2 (1992) (opening statement of Sen. John Glenn, D-Ohio, chairman of the committee). One 1979 bibliography of Kennedy assassination sources listed more than 5,100 books, articles, reports, films, and television programs.

[2] *See generally* Andrew Blum, *JFK conundrum: lawyers have become litigation pests to bureaucrats for JFK assassination records,* NAT'L L.J., Dec. 23, 1991, at 34., and Michael R. Beschloss, *Assassination and Obsession, From Lincoln to JFK, the Murders on Our Minds,* WASH. POST, Jan. 5, 1992, at C1.

[3] The volume of new information and interest in these materials traditionally increases in the fall as the anniversary of Kennedy's death approaches. In fall 1993, for example, 10 new books were released on the assassination, most of them either supporting or refuting the "conspiracy theory." See *The Man With a Deadly Smirk,* U.S. NEWS & WORLD REPORT, Aug. 30, 1993, at 62.

[4] "JFK" (Warner Bros. 1991).

[5] *Hit Film Prompts Release of Kennedy Documents*, CQ ALMANAC, 1992, at 77.

[6] Pub. L. No. 102-526, 106 Stat. 3443.

Act is designed to create "an enforceable, independent, and accountable process for the public disclosure" of records related to the Kennedy assassination.[7] The Act requires the federal government eventually make public all information about the assassination to through the National Archives. As soon as agencies, libraries, and committees transmit the information to the Archives, the archivist is to quickly release all but the most sensitive information, which will be periodically reviewed but sealed for no more than 25 years.[8] In passing the Act, Congress declared that "all government records concerning the assassination of President John F. Kennedy should carry a presumption of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination."[9]

However, nearly two years after the Act became law, many sealed records -- especially the ones that Kennedy researchers have tried unsuccessfully for years to open -- have yet to see daylight. Congress members and researchers have attacked the executive branch's lackadaisical compliance with the law, which has left Congress scrambling to pass a last-minute extension of the Act before it adjourned in August 1994. In addition, members of the executive branch have raised questions about the Act's constitutionality because of executive privilege and the president's appointment powers, while litigants trying to wrest assassination information from the government have tested the Act's relationship with the federal Freedom of Information Act in at least two recent court cases. In short, the passage of the Kennedy Records Collection Act of 1992 has not marked an end to the nation's 31-year quest to release all information about the assassination.

This paper examines the passage of the Act, problems raised to date in implementing the Act, and legal considerations that could weaken the Act's effectiveness in forcing the release of all Kennedy assassination records. After the introduction, section II traces the background of the legislation, detailing the context in which the legislation was proposed, the failure of the Freedom of Information Act to make assassination information available to the public, the legislative history of the Act, and the scope of government files on the Kennedy assassination. Section III details implementation of the Act to date, including a lack of compliance and a lengthy delay in presidential appointment of a special board to review sensitive materials. Section IV examines legal considerations that may threaten the Act, including claims of executive privilege to protect sensitive information and other possible separation of power considerations. Section V outlines two 1993 recent cases that have tested the limits of the Act in relation to the Freedom of Information Act. The paper concludes by suggesting that the lack of compliance with the JFK Act to date coupled with recent court rulings on the Act's scope mean the impact of the Kennedy Assassination Records Collection Act of 1992 is much less than Congress intended and open-records proponents hoped.

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[7] Id. at § 2(a)(3).

[8] Id. at § 5(g)(2)(D).

[9] Id. at § 2(a)(2).

II. Background

A. The Triggering Event: "JFK"

Oliver Stone based "JFK" on a book by Jim Garrison, a one-time New Orleans district attorney who brought a conspiracy theory of the assassination to trial during his prosecution of businessman Clay Shaw. The movie portrays Kennedy's death as the result of a far-reaching plot within several government agencies and the military and details the "cover-up" of information that followed.[10] The film attracted widespread criticism even before its release for distorting the facts. President Bush's outrage prompted him to phone the Rush Limbaugh radio show the day after the movie's December

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[10] "JFK" *supra* note 4.

20, 1991, release date to blast Oliver Stone for "poisoning a whole generation."[11] Stone, defending his fictionalization of the event, wrote:

> With "JFK," we are attempting to film the true meaning of the Dallas labyrinth--the mythical and spiritual dimension of Kennedy's murder--to help us understand why the shots fired in Dealey Plaza still continue to reverberate in our nightmares. In a sense, the Warren Commission report, inadequate as a record of facts, was a stunning success as a mythical document...Our film's mythology is different, and, hopefully, it will replace the Warren Commission report, as Gone With the Wind replaced Uncle Tom's Cabin and was in turn replaced by Roots and The Civil War.[12]

Released during the peak Christmas movie-going period, "JFK" attracted millions of Americans to theaters. The movie grossed more than $70 million at the box office in the United States[13] and received eight Academy Award nominations, including one for best picture of 1991.[14] But box office receipts and award ceremonies did not reveal the film's real impact. The movie rekindled public debate over the assassination and influenced how individuals who saw the movie perceived the event and government in general.[15] A postscript to the movie before the credits rolled chided the government, including Congress, for withholding information about the assassination.[16] Nearly one million of the more than three million pages of government documents connected to the event remained sealed at the time of the movie's release.[17] U.S. Rep. John Conyers Jr. noted the film's effect during an April 28 congressional hearing on the assassination records when he told "JFK" director Stone "you are probably the reason that we are all here today, and you have moved the country and the Congress to immediate activity with reference to the subject matter that brings us here today."[18]

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[11] Frank J. Murray, *President phones radio program to rip 'JFK' film*, WASH. TIMES, Dec. 21, 1991, at A3.

[12] Oliver Stone, *Oliver Stone Talks Back*, PREMIERE, January 1992 at 67, 72.

[13] *U.S. pix at home and abroad*, DAILY VARIETY, Jan. 6, 1993. The movie did even better in foreign distribution, where it collected $120 million in box office receipts.

[14] David J. Fox, *Academy Awards Nominations*, L.A. TIMES, Feb. 20, 1992, at F1. The film was second only to "Bugsy" in attracting the prestigious nominations.

[15] William R. Elliott et al., *Synthetic History and Subjective Reality: The Impact of Oliver Stone's "JFK"* (August 1992) (unpublished manuscript, presented at the 75th annual meeting of the Association for Education in Journalism and Mass Communication, Montreal, Quebec, Canada). The authors interviewed 143 individuals and concluded that "JFK" played a significant role in the development of the audience's image of the Kennedy assassination. The film increased knowledge about the assassination, belief in a shadow government, and interpersonal discussion of the assassination.

[16] "JFK," *supra* note 4.

B. Frustration with FOIA

Journalists, researchers, academics, interest groups, and other interested individuals have tried to pry open the more than one million pages of sealed Kennedy assassination documents through the federal Freedom of Information Act (FOIA) since it was passed in 1966. FOIA was designed to promote governmental accountability by providing statutory public access to most information held by government.[19] But governmental entities can withhold information through nine exemptions to FOIA.[20] All but three of these exemptions -- those dealing with oil wells, financial regulation, and trade secrets -- could be easily used by agencies seeking to keep Kennedy assassination records closed. While hundreds of thousands of pages on the assassination have been released under FOIA, those seeking to uncover substantive information about the assassination have discovered the limits of FOIA.[21] Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press, told Congress of the exasperation reporters feel with FOIA:

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[17] H.R. REP. No. 625, Part 1, 102nd Cong., 2nd Sess. 8 (June 29, 1992) [hereinafter H.R. Rep. No. 625, Part 1].

[18] *Assassination Materials Disclosure Act of 1992, Hearings on H.R. J. Res. 454 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations,* hereinafter Legis. and Nat'l Security Subcomm. hearing] 102nd Cong. 2nd Sess. 89 (1992).

[19] 5 U.S.C. § 552 (1993).

[20] Id. at (b). FOIA requirements do not apply to matters that are:
(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552 b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

> We believe that the executive branch has so routinely and categorically claimed exemptions to the FOI Act that it has lost sight of the purpose of the Act. The government cannot realistically claim that the release of these old records would cause harm so serious as to outweigh the public's interest in how and why its president died. We suspect that in denying these records, the government did not consider what harms might occur from release, and instead simply looked for exemptions to apply...The FOI Act is not working to give the public access to the records it should see.[22]

Those not satisfied with governmental agencies' claims of FOIA exemptions have turned to the courts for relief. The case law stemming from Kennedy assassination researchers using FOIA can be

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(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including State, local, or foreign agency or authority or private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
(9) geological or geophysical information and data, including maps, concerning wells.

[21] H.R. REP. NO. 625, Part. 1 *supra* note 17 at 18.

[22] *Assassination Materials Disclosure Act of 1992: Hearing on H.J. Res. 454 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, [hereinafter Econ. and Commercial Law Subcomm. hearing] 102nd Cong., 2nd Sess. at 157-158 (May 20, 1992).

divided into two categories: "exemption" cases, which seek information that government contends is exempted from FOIA; and "scope/procedure" cases, which challenge the search processes government has used to fill requests for information.[23] In exemption cases, in which agencies have sought to hold information under one of the nine FOIA exemptions, courts have tended to defer to the agencies' preferences for non-disclosure and interpret the exemptions broadly.[24] For example, in 1984, the D.C. district court ruled in *Hoch v. CIA* that the CIA could withhold information under FOIA exemptions 1, 3, 5, 6, and 7, even though at least part of the information being withheld had already been revealed by congressional committees and the media.[25] A similar case, decided by the D.C. Court of Appeals in 1992, found that the Justice Department could withhold tape recordings that may have been connected with the assassination even though large portions of the tapes had already been played as evidence in a public trial.[26] In scope/procedure cases, the courts look at the steps agencies took when searching for the requested information and require that they conduct a more thorough search if the procedure is deemed inadequate.[27] However, courts also have ruled that the scope of searches required to retrieve information could place too much of a burden on the agencies and therefore required that no additional searches be conducted.[28]

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[23] Vanessa L. Webster, *Truth Justice and the American Way--Revelation Comes Due for J.F.K.: The John F. Kennedy Assassination Records Collection Act of 1992*, 17 SEATON HALL LEGIS. J. 261, at 280 (1993). Exemption cases include *Nichols v. U.S.*, 460 F. 2d 671 (D.C. Cir. 1972); *Weberman v. Nat'l Security Agency*, 668 F. 2d 676 (D.C. Cir. 1072); *Allen v. CIA* 516 F. Supp. 342 (D.D.C. 1980); *Shaw v. FBI*, 649 F. 2d 58 (D.C. Cir. 1984); and several others. Scope/procedure cases include *Weisburg v. Dept. of Justice*, 543 F.2d 308 (D.C. Cir. 1976); *Weisburg v. Dept. of Justice*, 627 F.2d. 365 (D.C.. Cir. 1980).

[24] *Id.* at 280, 281. Webster cites *Allen v. Dept. of Justice*, 658 F. Supp. 15 (D.D.C. 1986), as a clear example of these types of cases. Allen wanted CIA assassination materials that the agency wanted to withhold on four FOIA exemptions. The court ruled with the CIA on every point because it interpreted exemptions that protect intelligence sources and methods broadly enough to include even dead sources, potential, possible, and unwitting sources and sources whom it is difficult or impossible to connect to withheld information.

[25] 593 F. Supp. 675 (D.D.C. 1984).

[26] *John Davis v. U.S. Department of Justice*, 968 F.2d 1276. (D.C. Cir. 1984)

[27] Webster *supra* note 23 at 284.

The Assassination Archives and Research Center has been the most aggressive litigator under FOIA in attempting to wrest Kennedy assassination materials from the government.[29] The non-profit organization, which collects, preserves, and dispenses information and materials on political assassinations, has helped litigate more than 50 FOIA cases seeking Kennedy assassination records, including some of the most celebrated.[30] The center, like other FOIA litigators seeking Kennedy materials, has been frustrated in its efforts to get agencies to turn over documents.[31] The center's attorney, testifying before Congress, cited one of the most famous cases in this area, *Weisburg v. Department of Justice,*[32] as an example of this frustration. The case, in which Weisburg sought scientific investigatory data collected after the assassination such as spectrographic and neutron activation analyses,[33] was tied up in the courts for more than 14 years and came before the D.C. Court of Appeals at least four times.[34] In the end, Weisburg received some of the scientific information that the FBI first contended did not exist or had been lost. The agency also turned over other, meaningless documents, according to the attorney, while still other records were never located.[35]

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[28] For example, *see Assassination Archives & Research Center v. CIA*, 720 F. Supp. 217 (D.C. Cir. 1989) at 220.

[29] Blum, *supra* note 2.

[30] *The Assassination Materials Disclosure Act of 1992: Hearing on S. J. Res. 282 Before the Senate Governmental Affairs Committee*, 102nd Cong., 2nd Sess. 74 (1992) (statement of James Lesar, president of the Assassination Archives and Research Center).

[31] Id. Lesar said many of the cases reveal a pattern of delay and costly litigation with little significant information being released.

[32] 543 F.2d. 308 (D.C. Cir. 1976)

[33] Id.

[34] Senate Governmental Affairs Committee hearings, *supra* note 30, at 75.

[35] Id.

The Weisburg case and others show that despite the volume of Kennedy litigation filed under FOIA, researchers have had limited success in opening cases through FOIA suits. The Assassination Archives Research Center contends FOIA has been weakened by recent legislative action such as the 1984 amendments that eliminated access to CIA operational files and the 1986 amendments to the law enforcement records exemptions.[36] In addition, President Reagan's Executive Order 12,356,[37] issued in 1982, eliminated declassification schedules designed to release classified information held by the executive branch. The order also provided for the reclassification of information that had already been released to the public.[38] This new executive branch policy "precluded the timely release of materials relating to the assassination."[39] Some FOIA litigants also contend that the courts have become more deferential to agency exemption claims in recent years,[40] while others who seek sealed information contend that the courts have never faithfully executed the provisions of FOIA.[41]

C. Legislative History

Agitated by "JFK" and frustrated with inadequate existing means to gain access to the information, constituents began to pressure certain members of Congress to pass legislation opening the records. For example, Rep. Louis Stokes, D-Ohio, the former chairman of the House Select Committee on Assassinations who had blocked past efforts to release the committee's records,[42] received nearly 1,500 letters and hundreds of telephone calls between January and May 1992 urging the release of the Kennedy files.[43] Stokes reversed his stance, becoming a primary sponsor of legislation to open the Kennedy files.

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[36] Id.

[37] Exec. Order. No. 12,356, 47 Fed. Reg. 14,874 (1982) [hereinafter Exec. Order No. 12,356].

[38] Id. at § 1.1(c), which states: "If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification.

[39] H.R. REP. No. 625, Part 1, at 17.

[40] Senate Governmental Affairs Committee hearings, *supra* note 24, at 76.

[41] Econ and Commercial Law Subcomm. *supra* note 22, at 167 (statement of the American Civil Liberties Union).

[42] Jim Lesar, *Public has the Right to See House Files on Assassinations*, STAR TRIB. (Minneapolis), Jan. 27, 1992, at 15A.

For several Congress members facing reelection, releasing the information was an attractive political issue, especially in an election year wrought with anti-incumbent sentiment and rampant distrust of government. Few voters object to more openness in government, and polls showed that the majority of the U.S. public wanted the sealed Kennedy assassination records released, which heightened interest among Congress members in releasing the documents. Public opinion polls suggest that a vast majority of Americans believe Kennedy's assassination stemmed from a conspiracy that was swept under the rug in a massive official cover-up.[44] Stone and other conspiracy theorists pushed for the release of the Kennedy records believing the "smoking gun" that would prove public opinion right would emerge from the document. Others sought to open the records to prove that there was no conspiracy or cover-up. Senate Intelligence Committee Chairman David Boren, D-Okla., also a primary sponsor of the legislation, said during a news conference announcing the legislation that he didn't think the files would unveil any stunning surprises. But, "the time has come to open these files to the public and let them speak for themselves."[45]

A few executive agencies, perhaps realizing the benefit of renewed public confidence in government, also began moving toward releasing assassination information. Even before Congress began considering bills to open the assassination records, the CIA set up a historical review unit to examine its 300,000 Kennedy records with a "bias toward declassification."[46] Former President Gerald Ford, the only surviving member of the Warren Commission, and 13 former staff members of the commission, also urged the release of all records on the assassination.[47]

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[43] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 43, 66 (May 20, 1992) (statement of Rep. Louis Stokes).

[44] David Snyder, *With Every Answer Questions; Details of JFK Killing Keep Theorists Busy*, TIMES-PICAYUNE, Nov. 21, 1993, at A1. A November 1993 Associate Press Poll showed that 71% of respondents thought Oswald was part of a conspiracy to kill Kennedy and 78% thought there was an official government cover-up to kept the public from learning the truth about the Kennedy assassination.

[45] *Legislation calls for release of most files on JFK assassination*, STAR TRIB. March 27, 1992, at 17A.

Given this context, several measures to open the Kennedy assassination files were introduced shortly after the 102nd Congress returned from its 1991 Christmas recess. Rep. Louise Slaughter (D-N.Y) introduced the first bill, H.R. 4090, on January 3, 1992.[48] The one-sentence bill required all branches of government to make all information pertaining to the Kennedy assassination available to the public.[49] Three other members introduced equally brief measures shortly afterward. Rep. Henry B. Gonzalez (D-Texas), who was later joined by eight co-sponsors, on January 22 introduced a resolution calling for the release of all records of the Select Committee on Assassinations.[50] Rep. Peter DeFazio (D-Oregon) introduced two measures on January 24. One mirrored Gonzalez's measure,[51] while the other required all records from the Warren Commission's investigation to be made public.[52] All four measures, which were vague as well as brief, died in committee. But the measures, the first of their type introduced in nearly seven years,[53] signaled that Congress was ready to consider legislation to open the Kennedy files.

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[46] *CIA Chief Willing to Release JFK Files; But Gates Awaits Government Action,* STAR TRIB., Feb. 22, 1992, at 7A.

[47] 138 CONG REC. H1986 (daily ed. March 26, 1992) (letter from Gerald R. Ford).

[48] 138 CONG. REC. H 117 (daily ed. Jan. 3, 1992).

[49] 1992 H.R. 4090. The bill required: that all information (1) held in each branch of the United States Government, other than information of vital national security interest; and (2) pertaining to the assassination of John F. Kennedy and the subsequent Federal investigation of that assassination; shall be made available to the general public.

[50] 1992 H. Res. 325, 138 CONG. REC. 118 (daily ed. Jan. 22, 1992). The resolution stated: that within thirty days beginning after the date of adoption of this resolution, the Archivist of the United States shall release for public use the records . . . of the Select Committee on Assassinations of the Ninety-fourth Congress and the Ninety-fifth Congress .

[51] 1992 H. Res. 326, 138 CONG. REC. 118 (daily ed. Jan. 24, 1992). This resolution stated: Upon the adoption of this resolution, the Clerk of the House of Representatives shall direct the Archivist of the United States to make available for public use all records of the Select Committee on Assassinations, notwithstanding any Rule, other resolution, or other action of the House. The resolution also stated that the select committee included committees created by H. Res. 1540 of the 94th Congress and H. Res. 222 of the 95th Congress to investigate the deaths of Kennedy and Martin

Two identical measures that provided the basis for what eventually became law were introduced in late March. H.R. J. Res. 454, sponsored by Stokes, and S. J. Res. 282, sponsored by Boren, provided congressional committees with the substantial framework they needed to shape legislation to open the documents.[54] The measures, which attracted 87 co-sponsors in both chambers, were based on the idea that the Kennedy records "should be released to the public at the earliest opportunity, except where clear and convincing justification exists for postponing the disclosure of such records to a specified time."[55] All assassination-related documents held by the executive branch and Congress were to be transferred to the National Archives and released to the public unless the executive agencies or congressional committees directed to turn over the information to the Archives requested postponement.[56]

Under the measures, disclosure could be postponed if the document would reveal an intelligence agent, source or method; matters relating to military defense, intelligence operations or conduct for foreign relations; an "invasion of privacy" by statutory definition; confidentiality between a

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Luther King Jr.

[52] 1992 H.R. 4108, 138 CONG. REC. 118 (daily ed. Jan. 24, 1992). The bill stated: The Archivist of the United States is directed to immediately make available for public use all records of the President's Commission on the Assassination of John F. Kennedy (commonly known as the "Warren Commission"), notwithstanding other provision of law.

[53] See Lesar, *supra* note 42 at 15A. The last measures to open the Kennedy files (specifically the House Select Committee on Assassinations records) were introduced by the late Rep. Stewart McKinney (R-Conn.) in 1983 and again in 1985, a measure which failed despite its 64 cosponsors.

[54] H.R.J. Res. 454, 102nd Cong., 2d Sess (1992); S.J. Res. 282, 102nd Cong., 2d Sess (1992).

[55] Id. at § 2(a)(5).

[56] Id. at § 4(a).

government agency and a witness or a foreign government; or security or protective procedures used by the Secret Service or other agencies.[57] A five-member independent review board appointed by a division of the U.S. Court of Appeals for the District of Columbia Circuit would determine which documents could be postponed.[58] The president could postpone the release of any executive branch document over the wishes of the review board, and the president's decision to postpone was not subject to judicial review under the proposed legislation.[59]

Three committees, the House Committee on Government Operations, the House Judiciary Committee, and the Senate Committee on Governmental Affairs, held six committee hearings on the resolutions.[60] The hearings attracted such star witnesses as Oliver Stone, Motion Picture Association of America president Jack Valenti, Director of Central Intelligence Robert Gates, and FBI director William Sessions. This testimony, and the comments of other government officials, researchers, legal scholars, and organized interests, prompted the committees to consider several changes to the resolutions.

Hopes for quick passage were dashed when, one day before the first hearing, the Department of Justice released a nine-page letter attacking the legislation on constitutional grounds.[61] With public opinion running high toward disclosure and "JFK" fresh in people's minds, sponsors had hoped the bill would reach the floor by Memorial Day 1992.[62] The Justice Department's chief objection to the measure was the court appointment and supervision of the review board, which the department contended would infringe on the president's authority to oversee the executive branch.[63] The dispute between the executive branch and Congress over control of the board nearly killed the legislation, which sponsors thought would sail through Congress in a few short months. At the height of the bickering, one exasperated committee member said, "I honestly, Mr. Chairman, cannot understand how we can get something so simple as this so complicated...It is very simple. All we want to do is release the material."[64]

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[57] Id. at § 6.

[58] Id. at § 5(b).

[59] Id. at § 8(h)(2).

[60] H.R. J. Res. 454 was discussed at hearings before the Legislation and National Security Subcommittee of the House Committee on Government Operations on April 28, May 15, and July 22, 1992, and before the Economic and Commercial Law Subcommittee of the House Judiciary Committee on May 20, 1992. Testimony on S.J. Res 282 was gathered at a May 12, 1992, hearing before the Senate Committee on Governmental Affairs.

[61] Legis. and Nat'l Security Subcomm. hearing, *supra* note 18 at 75-83 (letter from W. Lee Rawls, assistant attorney general).

The House Government Operations Committee acquiesced to the Justice Department's wishes and passed a modified measure on June 3 that gave appointment authority of the panel to the president. But the House Judiciary Committee strongly objected to the change and sent the bill to the floor with appointment power still vested in the courts.[65] The dispute over appointment of the review board was significant for two reasons. First, the objections from the executive branch stalled the Kennedy legislation for several months, nearly killing the measure. But of even greater significance, in hindsight, is that the executive branch objections were the first signal of separation of power issues that would be raised after the JFK Act's passage. The outcome of this decision has proven to be one of the key aspects determining the Act's eventual impact.

The difference of opinion over the appointment of the review board mainly stemmed from different interpretations of *Morrison v. Olson*,[66] one of four key Supreme Court Cases that have brought legislative-executive conflicts and separation of power issues to the forefront in the past 20 years.[67] Morrison, a 1988 case, involved the appointment of an independent counsel by a special panel of federal judges under the Ethics in Government Act.[68] In that case, the Justice Department contended that appointment by a court panel, not the president, was unconstitutional under the appointments clause, the doctrine of separation of powers, and Article III of the U.S. Constitution.[69] The Court rejected the constitutional claims seven to one.[70]

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[62] Virginia Cope, *Justice's Opposition May Slow Release of Long-Secret Files,* CQ WEEKLY, May 2, 1992. Sponsored feared that any challenge, especially a constitutional one, could dampen enthusiasm for the measure and cause them to miss the window of opportunity for passage that the "JFK" helped create.

[63] Legis and Nat'l Security Subcomm. hearing, *supra* note 18 at 78.

[64] Id. at 435 (statement of Rep. Frank Horton).

[65] Virginia Cope, *Panel Tries to End JFK Files Impasse,* CQ WEEKLY, July 25, 1992, at 2152.

In expressing opposition to the Kennedy records legislation, the Justice Department contended that Morrison indicated that judicial appointment of the review board would be unconstitutional. In the department's view, the Court upheld the constitutionality of the restrictions on removing independent counsel "only after it was satisfied that the restrictions did not impermissibly burden the president's power to control or supervise the independent counsel as an executive official."[71] Therefore, review board members, like the independent counsel, were seen as officers of the executive branch who should be appointed and removed by the president.[72] However, congressional sponsors and some legal scholars called to testify interpreted the Morrison decision to mean that the Court had rejected a rigid separation of powers among the three branches. The opinion was seen as signaling a new trend toward Supreme Court functionalism and judicial restraint in separation of powers issues and a shift away from strict, formal interpretation of the separation of powers doctrine.[73] In this view, the Court held that "Congress could delegate authority to bodies independent of the president as long as the delegation does not impermissibly undermine the powers of the executive branch or disrupt the proper balance between coordinate branches of government."[74]

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[66] 487 U.S. 654 (1988)

[67] Suzanne Prieur Clair, *Separation of Powers: A New Look at the Functionalist Approach.* 40 CASE W. RES. 331. The other three cases are: *United States v. Nixon*, 418 U.S. 683 (1974), *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919 (1983), and *Bowsher v. Snyar,* 478 U.S. 714 (1988).

[68] 487 U.S. 654, *supra* note 66.

[69] Id.

[70] Id.

[71] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 83. (statement of David G. Leitch, deputy assistant attorney general, Department of Justice).

[72] Id.

On August 12, 1992, the House passed the version of the bill preserving the court appointment of the board.[75] Meanwhile in the Senate, the Justice Department and the Governmental Affairs Committee agreed to a compromise and modifications of H.R. J. Res. 454 that vested appointment powers with the president. This key change, along with other minor modifications, was reported from the Senate Governmental Affairs Committee as a new bill, S. 3006, sponsored by Sen. John Glenn, D-Ohio.[76] House Judiciary Chairman Jack Brooks, D-Texas, balked at the Senate compromise because he feared it might set a precedent in a dispute with the executive branch over the reauthorization of the independent counsel law, which mirrored the dispute in *Morrison v. Olson.*[77] But with Congress ready to head home for the November 3, 1992, congressional elections and with no end to the dispute, Brooks went along with the Senate bill "with some misgivings."[78]

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[73] Edward Susolik, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law,* 63 S. CAL. L. REV. 1515, at 1518.

[74] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 142 (statement of Louis M. Seidman, a law professor at Georgetown University).

[75] 138 CONG. REC H8091 (daily ed. Aug. 12, 1992).

[76] 138 CONG REC. S10125 (daily ed. July 22, 1992).

[77] *JFK Disclosures Cleared by Hill,* CQ WEEKLY, Oct. 3, 1992, at 3018. Brooks believed that a compromise on the board's appointment would weaken Congress' position when trying to preserve the independent counsel law contained in the Ethics in Government Act of 1978 (28 U.S.C. 49, 591, Supp. 1993). The Bush administration's opposition to judicial review board appointment was the same as its opposition to judicial appointment of special counsels in Morrison. The administration contended that, despite Morrison, the president should appoint inferior officers of the executive branch, and that any legislative provision for judicial appointment was a violation of separation of powers.

On September 30, the House passed the final version of the bill,[79] which contained a few differences from the initial legislation. In addition to allowing the president, not a court, to appoint the review board, the Act added a section specifically to allow for judicial review of final actions taken by the board to release or postpone the release of information.[80] In addition, the final measure removed a provision that exempted the board and its staff from lawsuits[81] to allow for another check on the board's actions. The language outlining grounds for postponement of documents in the bill as sent to President Bush for action remained virtually unchanged from the initial legislation.[82] However, one new ground for postponement, providing for postponement if a record would reveal the identity of a confidential governmental source, was added.[83] Interestingly, the new provision is the only one that does not include a balancing test that must be used if information is to be withheld. In the other four postponement categories, the review board must determine that the grounds for postponement "outweigh the public interest" if it decides not to release certain records.[84] The Act also more clearly defined what entities would be forced to turn over information.[85]

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[78] Id.

[79] 138 CONG REC. H9911 (daily ed. Sept. 30, 1992).

[80] Pub. L. No. 102-526 at § 11(c).

[81] H.R. J. Res. 454 at § 8(l).

[82] Pub. L. No. 102-526 §§ 6(1-5).

[83] Id. at § 6(2).

[84] Id. at §§ 6(1),(3),(4) and (5). The grounds for postponement stipulate that information may be withheld if there is clear and convincing evidence that:
(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination is of such gravity that it outweighs the public interest, and such public disclosure would reveal--
    (A) an intelligence agent whose identity currently requires protection;
    (B) an intelligence source or method which is currently utilized or reasonably expected to be utilized by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or
    (C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States;
(2) the public disclosure of the assassination record would reveal the name or identity of a living

D. The Scope of Kennedy Assassination Records

Several federal agencies, offices, congressional committees, and libraries hold the nearly three million pages of government files on the assassination. Although some collections--such as the Warren Commission files--are virtually all public, while others--such as those generated by the House Select Committee on Assassinations--remain completely sealed.[86] Likewise, some entities have accounted publicly for all of their records, while others have not disclosed, or even begun to count, the number of files they hold. These holdings were at various stages of disclosure at the time the JFK Act became law.

The Warren Commission. The President's Commission on the Assassination of President Kennedy, known as the Warren Commission, was established by President Johnson seven days after

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person who provided confidential information to the United States and would pose a substantial risk of harm to that person;
(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;
(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or
(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and the public disclosure would be so harmful that it outweighs the public interest.

[85] Pub. L. No. 102-526 §§ 3(2)(A-L). The act applies to the Warren Commission, the Rockefeller Commission, the Church Committee, the Pike Committee, the House Assassinations Committee, the Library of Congress, the National Archives, and Executive Agency, any independent agency, any other federal office, and any state or local law enforcement office that provided support or assistance to a federal inquiry into the assassination.

[86] H.R. REP. No. 625, Part 2, 102nd Cong., 2nd Sess. 12 (June 29, 1992) [hereinafter H.R. Rep. No. 625, Part 2].

Kennedy's death.[87] By the time the commission disbanded on September 24, 1964, it had issued a 26-volume report and generated 1,000 boxes of records. The National Archives holds all 363 cubic feet of the commission's records, which include transcripts of the hearings, administrative and investigative documents, records from foreign and U.S. government agencies, letters from the public, and audio visual materials. About 98 percent of the Warren Commission materials had been released under the Freedom of Information Act by early 1992.[88]

The Rockefeller Commission. President Ford established the Commission to Investigate CIA Activities Within the United States, or the Rockefeller Commission, on January 5, 1975, to determine whether any domestic activities of the CIA exceed the agency's statutory authority.[89] The National Archives holds 23 feet of materials from the commission, 2,500 pages of which relate to the Kennedy assassination.[90] When the JFK Act was debated, it was unclear whether any of the materials had been made public.[91]

The Church Committee. The Senate established the Church Committee on January 27, 1975, to examine how intelligence agencies assisted the Warren Commission. The 5,000 pages generated by the committee remain in the possession of the Senate Select Committee on Intelligence, which had not released any documents to the public.[92]

The House Select Committee on Assassinations. The committee, established on September 17,

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[87] Exec. Order. No. 11,130, 28 Fed. Reg. 12,789 (November 29, 1963).

[88] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 80 (prepared statement of U.S. archivist Don Wilson). The material that remains sealed has been withheld under exemptions 5 U.S.C. § 552 (b)(1), (b)(3), (b)(6), and (b)(7).

[89] Exec. Order No. 11,828, 3 C.F.R. 933-34 (1975).

[90] Econ. and Commercial Law Subcomm. hearing, supra note 22 at 80, 81 (prepared statement of U.S. archivist Don Wilson). As donated historical materials, access to the materials is governed by 44 U.S.C. 2107, President Ford's deed of gift, and Executive Order 12356.

[91] H.R. Rep. No. 625, Part 1, *supra* note 17 at 13.

[92] Id. at 11, 13.

1976, examined several assassinations, including the Kennedy assassination.[93] The committee generated 370 cubic feet of files, or 747,000 pages of records.[94] The committee's Kennedy task force created about 414,000 of those pages.[95] The records include classified and unclassified documents on loan from federal agencies and private individuals, committee staff materials, transcripts of committee open sessions, and executive hearings and meetings.[96] The committee, which ran out of time and money, went out of existence without providing for public access to its files.[97] Therefore, the National Archives received the 848 boxes of records in 1979 and sealed the records under a House rule that seals for up to 50 years all records not made public at the time they were collected by the committees.[98]

The FBI. FBI files relating to the assassination contain 499,431 pages of documents on the assassination. Nearly 225,000 of these documents were fully or partially released to the public at the FBI's public reading room after amendments to the Freedom of Information Act in 1974. About 3,600 of some 22,000 related files, for example holdings on Oswald's widow, Marina, and conspiracy theorist Jim Garrison, were available to the public by early 1992.[99] The FBI formed a task force in April 1992 to begin processing its remaining records for public release. Only information that falls in one of five narrow categories would remain classified by the FBI.[100]

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[93] Id. at 12.

[94] Econ. and Commercial Law Subcomm. hearing, supra note 22 at 81 (prepared statement of U.S. archivist Don Wilson).

[95] Id.

[96] Id. at 33 (statement of Rep. Louis Stokes).

[97] Lesar, *supra* note 31.

[98] Econ. and Commercial Law Subcomm. hearing, *supra* note 22. See also House Rule 36.

[99] Id. at 106-107.

[100] Id. 93 (statement Floyd I. Clarke, deputy director, FBI). Information that will remain classified includes national security information; information that would disclose the identities of individuals who requested confidentiality, confidential informants, or confidential sources; highly personal information

The CIA. The CIA had released only about 11,000 pages of information it held on the assassination as of 1992.[101] To begin reviewing its nearly 300,000 pages of materials, which include 64 boxes and originals of information sent to the Warren Commission and 17 boxes on Lee Harvey Oswald accumulated after the assassination, the agency formed a 15-member Historical Review Group.[102]

Secret Service. About 11 boxes of material from the Secret Service, or 11,000 pages, are held in the National Archives. Virtually all of the material is duplicated in the Warren Commission records and therefore was already available to the public.[103]

Department of Justice. The National Archives holds about 65,000 pages from the Department of Justice, mainly letters from the general public, constituent mail from Congress and responses from the Justice Department and the FBI. About 11,000 were withheld under the Freedom of Information Act exemptions.[104]

Department of State. The State Department transferred about 7,000 pages in two cases to the Archives, which was reviewing the documents for release.[105] Although the State Department clearly possesses many more records,[106] an official accounting of the documents was not available at the time the JFK Act was being debated.

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about individuals; and confidential information provided by other government agencies.

[101] H.R. Rep. No. 625, Part 1, *supra* note 17 at 13.

[102] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 109-110 (statement of William O. Studeman, deputy director, CIA). Studeman said the review process could be lengthy because the holdings were not indexed, uncataloged and highly disorganized.

[103] Id. at 80 (prepared statement of U.S. archivist Don Wilson). The scattered documents not released are withheld under 5 U.S.C. § 552 (b)(1), (b)(6), and (b)(7).

[104] Id. The scattered documents not released are withheld under 5 U.S.C. § 552 (b)(6), and (b)(7).

[105] Id.

[106] *National Archives Announces Opening of Additional Information from the John F. Kennedy Assassination Records Collection*, news release from the National Archives Public Affairs Office, Nov. 30, 1993.

III. IMPLEMENTATION

A. Release of Documents

The Kennedy Assassination Records Collection Act's impact remains unclear nearly two years after its enactment. Official accounts of compliance with the Act are not yet available, but news accounts suggest that at least some previously unreleased information has been made public. The Act stipulated that all records not covered under the five postponement exemptions in section 6 of the Act be turned over to the National Archives by August 22, 1993.[107] On August 23, the Archives released about 900,000 pages of records from the Warren Commission, the House Select Committee on Assassinations, the Central Intelligence Agency, the Rockefeller Commission, and the Kennedy, Johnson, and Ford presidential libraries.[108] Since then, records have been released periodically as agencies turn over additional documents. As of March, 1994, agencies had sent the National Archives about 92,000 documents that it had catalogued in its JFK records computerized database.[109]

While some new information is contained in those newly opened documents, other records contained only inconsequential information. *The Miami Herald* trumpeted the initial release of documents on its front page with the headline "JFK files a wealth of facts, speculation," and noted that three decades of secrets--ranging from CIA theories of Soviet involvement to Oswald's boast to a Russian friend that he planned to kill the president--had been unlocked.[110] But a report in *USA*

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[107] Pub. L. No. 102-526 § 5(c)(1).

[108] *National Archives Opens Additional Materials from the President Kennedy Assassination Records Collection,* Aug. 17, 1993, available in LEXIS, Nexis Library, CURRNT File.

[109] Telephone interview with Steve Tilly, National Archives staff member serving as liaison for the JFK documents (March 31, 1994). Tilly works with agencies about getting material released, handles requests from the public for information, and will work directly with the review board when it begins meeting.

[110] THE MIAMI HERALD, Aug. 24, 1993 at 1A, 8A.

Today contained Oswald vignettes, such as an overdue library book attacking U.S. policies in Latin America that Oswald had not returned at the time of his arrest.[111] Many of the documents released contained several sections that were blacked out because the information remained classified.[112] Also, many of the records released through the archives previously had been available to the public.[113] Dan Alcorn, a member of the board of directors of the Assassination Archives and Research Center, lamented that "the things we really wanted to zero-in on are not here."[114]

Researchers have found little more substance in the additional files that have been released since August. A November 30, 1993, news release from the National Archives Public Affairs Office listed information made public under the Act in addition to the initial release of about 900,000 pages in September. This new information included tape recordings and transcripts from the Lyndon B. Johnson Library, about 350 pages of letters and memoranda from the Defense Intelligence Agency, eight additional cubic feet of embassy files and diplomatic security files from the Department of State, ten cubic feet of handwritten logs from the John F. Kennedy Library identifying visitors to the White House, briefing books for subcommittee hearings from the House Select Committee on Assassinations, about 100 pages of Rueters News Service cables and other correspondence from the National Security Agency, and about one cubic foot of letters, reports and notes from the Executive Office of United States Attorneys.[115]

Of these records, only a handful have attracted widespread media attention. For example, the 275 transcripts of Lyndon Johnson's telephone conversations between November 22 and December

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[111] Tony Mauro, *JFK Files, Oswald Secrets released: Files fill gaps, buffs clamor for still more*, USA Today, Aug. 24, 1993, at 1A.

[112] MIAMI HERALD *supra* note 110 at 8A.

[113] Mauro, *supra* note 111.

[114] Id.

[115] *National Archives Announces*, supra note 106.

31, 1963, originally held under a 50-year restriction, showed that Johnson feared possible Soviet or Cuban involvement that could lead the United States into a nuclear war.[116] Also, interesting information emerged in a 133-page CIA inspector general's report released under the Act in November 1993. The report confirmed widely circulated rumors by providing details about the CIA's collaboration with the Mafia to kill Cuban President Fidel Castro, including schemes involving, poisoned cigars and poison-tipped ballpoint pens.[117] But, according to one published report, reaction to the releases has been tepid at best. When the archives released 80 cardboard boxes of declassified FBI records in April 1994, "the archivists often outnumbered the reporters and researchers who turned up to sift through the records."[118]

Despite these disclosures, researchers, journalists, and even some government officials still are uncertain how many documents remain sealed. Formal agency accounts of the released and sealed documents are not yet available, leaving mainly anecdotal evidence and news reports of suppressed information. A newsletter published by the Assassination Archives and Research Center estimates that, at best, a third of the documents have been released, leaving more than two million documents sealed.[119]

Details about what remains sealed are sketchy. Acting archivist Trudy Patterson said about 840 cubic feet of materials were available for research as of November 1993, but that volume represented only about 10 percent of the total federal government records on the assassination.[120] Again, only anecdotal evidence and sometimes conflicting media accounts are available on what is being withheld. For example, the CIA announced in August 1993 the release of 23,000 pages of previously secret documents related to the assassination.[121] But the CIA sought to withhold at least 10,000 pages.[122] The new director of Central Intelligence under President Clinton, R. James Woolsey, testified before a House committee in September 1993 that the agency planned to reverse its decision to keep the documents sealed and release 80 percent to 90 percent of the remaining 10,000 pages by October 1993.[123] "I think in these days and times it's important for people to understand as much as we can tell the world as a whole about how intelligence works, and we've disclosed a lot of historical material, and we're disclosing a lot more," Woolsey said recently.[124] Despite this public push toward release, some estimate that the CIA is still withholding at least 160,000 pages.[125] The archivist in charge of the release of the JFK documents said that the National Archives has yet to receive any materials from the CIA to catalogue in the Kennedy records database.[126]

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[116] Jim Wolf, *LBJ Feared Possible Nuclear War Over JFK Killing*, REUTERS, Sept. 22, 1993, and LBJ Files/JFK Assassination, FNS DAYBOOK, Sept. 22, 1993, both available in LEXIS, Nexis Library, CURRNT File.

[117] *CIA Bares Old Plots to Kill Castro*, PRESS ASSOCIATION NEWSFILE, Nov. 17, 1993, available in LEXIS, Nexis File, CURRNT Library.

[118] Ronald Brownstein, *U.S. Releases New Papers on Kennedy Assassination*, LA TIMES, April 2, 1994.

[119] *AARC News*, newsletter from the Assassination Archives and Research Center, Washington, D.C., Fall 1993, at 1.

The FBI had released no new documents to meet the conditions of the Act by the end of 1993.[127] Documents began being released by the FBI in January 1994, and as of June 7, about

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[120] John Hanchette, *JFK Remembered -- Debate Rages Over JFK Assassination Records,* Nov. 20, 1993, GANNETT NEWS SERVICE, available in LEXIS, Nexis library.

[121] *CIA Set to Release Kennedy Assassination Files,* REUTERS, Aug. 18, 1993, available in LEXIS, Nexis Library, Wires File.

[122] MIAMI HERALD, *supra* note 110 at 8A.

[123] *CIA to Open Up Secrets, 'Warts and All,' Director Says,* WASH. POST, Sept. 29, 1993, at A6.

[124] The MacNeil/Lehrer NewsHour (PBS television broadcast, Oct. 19, 1993).

[125] *Clinton Accused of Thwarting JFK Documents Law,* REUTERS, Oct. 26, 1993, See also Oliver Stone's remarks in DAILY VARIETY, Aug. 24, 1993, both available in LEXIS, Nexis File, WIRES Library.

[126] Tilly *supra* note 109.

[127] Id., see also Hanchette, *supra* note 120.

114,690 pages had been released by the agency.[128] However, that number is just a fraction of the more than 1 million pages held by the FBI.[129] Failure to release documents is not confined to the executive branch. Congress has not turned over at least 5 percent of the files from the House select assassination committee.[130] "Two percent should be kept secret, and another 3 percent should come out . . . the American people aren't getting the material they're entitled to," said G. Robert Blakey, a Notre Dame law professor who was counsel to the House committee.[131]

B. Compliance

Part of the problem in determining exactly how much new material has come out under the act stems from the failure -- on the part of the president and some executive agencies -- to comply with the Act's provisions, especially the strict deadlines for compliance included in the measure. The most glaring evidence of lack of compliance was that the Assassination Records Review Board was not formed until 16 months after the Act was signed. Nominations for the board were to have been made 90 days after the act became law, on January 25, 1993.[132] But President Bush failed to make any nominations before he left office on January 20. President Clinton announced his intention to nominate four members of the five-member board on September 3,[133] more than seven months past the deadline. Clinton announced the final nomination in November 1993.[134] The Senate could not begin confirmation hearings until receiving the formal nominations on at least three board members.[135] It held hearings in February [136] and confirmed the panel by March. The Senate was directed by the Act to begin hearings within 30 working days of the president's nomination and vote within 28 working days following the hearings.[137]

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[128] *National Archives Releases Additional Materials from the JFK Assassination Records Collection,* U.S. NEWSWIRE, June 7, 1994.

[129] *FBI Continues Transfer of JFK Files,* U.S NEWSWIRE, Jan. 31, 1994, available in LEXIS, Nexis library.

[130] Mauro, supra note 111.

[131] Id.

[132] Pub. L. No. 102-526, § 7(b)(2), 106 Stat. 3450.

[133] *Panel to Review Rest of Secret JFK Records,* CHIC. TRIB. Sept. 4, 1993, at 12. The nominees are Princeton University librarian William Joyce, University of Tulsa dean Kermit Hall, American University history professor Anna Kasten Nelson, and Minnesota Chief Deputy Atty. Gen. John Tunheim.

The review panel was sworn in on April 11, 1994, and held its first meeting the next day, with funding of $250,000 provided by the White House.[138] The board's work couldn't begin in earnest until it had hired an executive director to facilitate the flow of documents. At its second meeting on July 12, the board named an executive director, but he was not set to begin his new job until August 8.[139] This clearly is in opposition to statutory requirements that the board was to have begun its review of the documents within 180 days of the Act's enactment[140] and to have issued its first report one year after the enactment.[141] The only report issued on October 26, 1993, came from the Assassination Archives and Research Center, which called compliance with the act "pretty much a shambles."[142] The center, contending that most agencies had not turned over their records, stated:

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[134] Hanchette, *supra* note 120.

[135] Pub. L. No. 102-526, § 7(d)(1). Only two members had been formally nominated as of November 1993.

[136] *Testimony February 1, 1994, William L. Joyce, Nominee Assassination Records Review Board, Senate Government Affairs,* Federal Document Clearing House, Inc., available on LEXIS.

[137] Pub. L. No. 102-526, §§ 7(d)(1),(2),(3)

[138] *Assassination Records Review Board to Hold its First Meeting,* U.S. NEWSWIRE, April 11, 1994.

[139] *JFK Review Board Appoints David Marwell as Executive Director,* U.S. Newswire, July 12, 1994. Marwell was director of the Berlin Document Center from 1988 until July 1, 1994, when the center was transferred to German control.

[140] Pub. L. No. 102-526 at § 9(b)(2), 106 Stat. 3454.

[141] Id. at § 9(f)(2), 106 Stat. 3456.

[142] Clinton Accused, *supra* note 125.

"The delay in appointing the review board is thwarting the public's access to information about the Kennedy assassination, a result totally at odds with the JFK's Act's goal of getting information out."[143]

Because of the delay, the board might not be able to review the tens of thousands of records slated for postponement before its statutory authority is terminated. As much as 10 percent of the total assassination materials may contain redacted material or be withheld in entirety at the agency level, according to the computerized database records at the National Archives.[144] Under the JFK Act, the review board would have to act on each of these documents. The Act provided for the board to function for two years from the date the Act was signed into law, meaning it would disband on October 26, 1994.[145] Although the Act allows the board to extend its tenure by one year if it has not finished its work by that time,[146] more than half of the board's possible three-year life span and the panel has yet to begin reviewing documents. To give the panel more time, Rep. John Conyers introduced the President John F. Kennedy Assassination Records Collection Extension Act of 1994 on July 14 extend the life of the review board by one year.[147] The House passed the extension on July 12[148] and urged the concurrence of the Senate before the Congress adjourned for the 1994 elections.[149] As of July 22, the Senate had not passed the bill.

During a hearing on the initial legislation in 1992, several witnesses and Congress members questioned whether two or even three years was long enough for the board to complete its work. Even with a one-year extension, some speculate that Congress will have to pass additional legislation to extend the life of the review board past 1995.[150]

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[143] Id.

[144] Tilly *supra* note 109.

[145] Pub. L. No. 102-526, § 7(o), 106 Stat. 3452.

[146] Id.

[147] 1994 H.R. 4569 § 2. In addition to the extension, the bill contains minor amendments to the 1992 act, such as requiring security clearance for review board personnel (§ 4) and giving the board the use of the Federal Supply Service and the U.S. mails (§ 5).

[148] 140 CONG REC H 5527.

[149] 140 CONG REC S 9030.

Agency compliance has been sluggish to date for several reasons. First the JFK Act does not include any penalties if the president, agencies, or Congress fail to meet the Act's provisions.[151] But the lack of incentives or penalties designed to induce compliance would not have been detrimental to the Act had the review board been promptly appointed, according to the archivist working with the agencies on the review of documents. "The drafters of the statute envisioned the review board as being the teeth," the liaison said. With the White House dragging its feet, "many agencies, frankly, didn't take it real seriously."[152] Agencies say they are complying with the Act, citing the time and staff devoted to releasing the documents as evidence. The three groups that hold nearly half of the documents, the National Archives, the CIA, and the FBI, have devoted more than 130 staff members to identifying and reviewing documents for information that might trigger one of the five grounds for postponement in the Act.[153] The staff member overseeing the FBI's JFK task force said, "We're trying to get as much information as we can out there. It's going to be well over 90 percent of the records that is ultimately released."[154]

The congressional committees that worked to enact the legislation have begun to express concern about the lack of compliance with the act. The House Permanent Select Committee invited CIA

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[150] Steve McGonigle, *Release of JFK Records May Be Delayed; Federal Review Board not yet named*, DALLAS MORNING NEWS, May 20, 1993, at 5A.

[151] Pub. L. No. 102-526. The only part of the Act that provides for any type of punishment is section 6(g), which allows for president or Congress to remove a member of the review board for "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties." 106 Stat. 3451.

[152] Tilly, *supra* note 109.

[153] McGonigle, *supra* note 150.

[154] Id.

Director Woolsey to testify on September 28, 1993,[155] and the Legislation and National Security subcommittee of the House Committee on Government Operations examined whether the new law was working during a November 17, 1993, hearing.[156] Notre Dame law professor Blakey summed up the frustration of those who expected real results from the Act: "I guess we're all doing this because Warner Bros. had allocated $40 million for publicity on the movie. Now that the PR budget has run out, we're back to business as usual."[157]

IV. EXECUTIVE CHALLENGES TO THE ACT'S CONSTITUTIONALITY

Although appointment of the review board was the only possible threat to the JFK Act's constitutionality discussed at length during congressional debates and hearings, other constitutional issues arise from an examination of the Act. Legal challenges to the Act could be based on separation of powers grounds, as President Bush indicated when he signed the Act into law.[158] Several aspects of the Act could pose a threat to the separation of powers doctrine, depending on whether a functionalist or a formalist approach used to view the Act. The functionalist approach sees the Constitution as granting separate powers to the three branches but does not see the branches as operating with absolute independence.[159] This approach emphases checks and balances among the branches, promoting separateness but interdependence.[160] Under this approach, an Act would violate the separation of powers doctrine only if the Act has prevented one of the branches from performing its constitutional duties.[161] The formalist approach defines sharp lines around each branch of government in the belief that separation of powers requires each branch to have maximum autonomy.[162]

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[155] *House Permanent Select Intelligence Committee meeting*, FNS DAYBOOK, Sept. 28, 1993, available in LEXIS, Legis Library, LEGNEWS File.

[156] See *Washington Daybook,* WASH. TIMES, Nov. 17, 1993, at A6.

[157] McGonigle, *supra* note 150.

[158] George Bush, *Statement on Signing the President John F. Kennedy Assassination Records Collection Act,* 28 WEEKLY COMP. PRES. DOC. 2134, 2315 (Oct. 26, 1992).

[159] Clair, *supra* note 67 at 333

[160] *See generally* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed., 1988).

President Bush's first objection to the Act stemmed from his claim of executive privilege, a presidential power not spelled out in the Constitution but given constitutional dimension in *United States v. Nixon*.[163] Presidents traditionally have used executive privilege to withhold information on military or national security grounds.[164] The JFK Act ultimately vests final authority to release or postpone disclosure of executive branch assassination records in the president's authority over review board determination.[165] But that authority is limited only to records that fall under the five postponement grounds listed in section 6.[166]

Bush noted in signing the Act that the grounds for postponement allow the president to postpone the release of information dealing with national security issues, at least in narrowly defined circumstances.[167] But the Act does not provide for nondisclosure of executive branch deliberations or law enforcement information. Bush balked at this omission: "My authority to protect these categories of information comes from the Constitution and cannot be limited by statute . . . I cannot abdicate my constitutional responsibility to take such action when necessary."[168] However, Louis M. Seidman, a law professor at Georgetown University who was asked to testify before Congress on the constitutionally of the Act, told members that the legislation did not run afoul of constitutional rights of executive privilege. The Act "does not and could not limit whatever constitutional authority the president possesses to claim executive privilege with regard to particular documents that he wishes to withhold," Seidman told lawmakers considering the Act.[169]

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[161] Clair, *supra* note 67 at 333.

[162] Id. at 335.

[163] 418 U.S. 683 (1974). The Supreme Court held that privilege devolved from the constitutionality prescribed separation of powers, *see* Tribe, *supra* note 148 at 275.

[164] Tribe, *supra* note 160 at 275.

[165] Pub. L. No. 102-526, section 9(d)(1): The President shall have the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6.

[166] Id.

[167] Bush *supra* note 158 at 2134.

President Bush also objected to a provision that gave congressional committees oversight of the review board's activities.[170] This provision, which stipulates that the board must provide oversight committees with written unclassified justification for postponing release of executive branch materials, could allow much of the classified information to be seen by at least some members of Congress.[171] Again, Bush cited his constitutional right of executive privilege to protect such information.

This congressional oversight of the board, which requires simultaneous reports to both the president and Congress, also intrudes on the president's authority to supervise subordinate officials in the executive branch, the president contended.[172] Power to appoint and supervise inferior executive branch officers stems from the Constitution[173] and from case law, most recently *Bowsher v. Synar*.[174] The 1986 case, which in effect gutted the balanced budget or "Gramm-Rudman Act" of 1985, arose from a provision in the Act that gave the Comptroller General the power to make budget cuts to meet the deficit-reduction plan. However, the budget act gave Congress, not the president, the power to remove the Comptroller General from his post. The Court ruled that the Comptroller General was an executive officer and that "congressional participation in the removal of executive officers is unconstitutional . . . to permit the execution of laws to be bested in an officer answerable only to Congress, would in practical terms reserve in Congress control over the execution of laws."[175] However, the JFK Act provides for presidential removal of the board and for the board to report to both the president and Congress,[176] suggesting that board members are not inferior executive officers. This congressional intent was made clear when a sponsor of the legislation testified that the Act "presupposes that the board is an independent agency, not an executive branch agency, and therefore is not under the control of the executive branch or control of the president. It is important to remember that our intent is to establish a neutral body and give legitimacy to our efforts."[177]

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[168] Id.

[169] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 140.

[170] Bush *supra* note 158 at 2134.

[171] Pub. L. No. 102-526, § 9(c)(4)(B), 106 STAT 3455

[172] Bush, *supra* note 158 at 2135.

[173] Art. II, § 2, cl. 2

[174] 106 S.Ct. 3181 (1986).

Congress had hoped to create a neutral panel through the appointment of the review board by a special judicial panel, but that provision was changed to presidential appointment to secure the Act's passage. However, to maintain at least the appearance of a unbiased review board, the Act contains strict guidelines for selecting the board's members.[178] The president was directed to consider people recommended by several professional associations,[179] and appoint "impartial private citizens. . . of high national professional reputation in their respective fields who are capable of exercising the independent and objective judgment necessary" to fulfilling their roles on the board.[180] Bush also strongly opposed these guidelines. "These provisions conflict with the constitutional division of responsibility between the president and the Congress. The president has the sole power of nomination; the Senate has the sole power of consent."[181] Although Clinton did not publicly state objections to the guidelines when nominating the board, the panel's composition already is being challenged by the most litigious assassination records group, the Assassination Archives and Research Center.[182]

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[175] Id. at 3188.

[176] Pub. L. No. 102-526, § 6(g)(1)(B) and § 9(c)(4)(B).

[177] Econ. and Commercial Law Subcomm. hearings, *supra* note 22 at 48,49 (statement of Rep. Louis Stokes).

[178] Pub. L. No. 102-526, § 7(b).

[179] Id. at § 7(b)(4)(A). The groups are the American Historical Association, the Organization of American Historians, the Society of Archivists, and the American Bar Association.

Bush, while briefly mentioning his support of the JFK Act,[183] clearly laid the groundwork for challenges to the Act both from the executive branch and other interested parties. Bush's statement in signing the Act could provide a framework for constitutional challenges should disputes arise over the nature of information to be released by the review board or the timetable for disclosure of sensitive information. The issues became moot for the Bush administration eight days later on November 3, 1992, when Bush lost his bid for reelection. None of the issues raised by Bush when signing the act has yet to come before the courts, in part at least because the review board has not started to function. But although Bush has left the White House, litigation could arise on these grounds if the board decides to release information against the wishes of the president or executive branch agencies. Modern presidents, regardless of political affiliation, have sought to protect executive branch powers from encroachment by Congress.[184] "No president likes to establish a precedent that weakens or erodes presidential authority. He wants to hand the office over to his successor in as intact a form as possible."[185]

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[180] Id. at § 7(b)(5)(A-C). The board also had to include at least one professional historian and one attorney.

[181] Bush, *supra* note 158.

[182] AARC News, *supra* note 119: Although the president nominated members based on the recommendations of the four professional associations, the group's newsletter lamented that "none of these persons appears to have extensive knowledge of the JFK assassination."

[183] Bush *supra* note 158 at 2134. Bush stated: "I fully support the goals of this legislation . . . all documents about the assassination should now be disclosed, except where the strongest possible reasons counsel otherwise."

V. JFK ACT AND FOIA CASES

Concern about FOIA's failure to guarantee the release of Kennedy records became the backbone of the legislation that led to the Assassination Records Collection Act. Large portions of the committee hearings focused on the limitations of FOIA, prompting Congress to state its intent strongly. In passing the JFK Act, Congress declared: "legislation is necessary because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy."[186] Congress' conclusion that FOIA was inadequate to force the release of Kennedy documents was based on two findings. First, the committees found that the executive branch had made "extensive and unjustified" use of the statutory exemptions to withhold materials that were no longer in need of statutory protection.[187] Second, agencies and courts have relied on presumption that all information should be withheld except material deemed releasable, a practice that contradicts the express language of

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[184] *See generally* Sidney M. Milkis and Michael Nelson, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776-1990 (1990) at 259, 260 and RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (1990) at 199.

[185] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 65, (statement of Rep. Henry J. Hyde).

[186] Pub. L. No. 102-536 § 2(a)(1).

[187] H.R. REP. NO. 625, Part. 1 *supra* note 17 at 18. The House Committee on Government Operations found that "all FOIA exemptions are permissive, not mandatory -- records that technically qualify for withholding can nevertheless be disclosed at the discretion of the agency. Unfortunately, agencies have been unwilling to use their existing authority to release documents that can be disclosed without harm."

FOIA that "the burden is on the agency to sustain its action."[188]

The exemptions in the JFK Act were drawn much more narrowly than exemptions in FOIA and were designed to release more documents than would be allowed under FOIA and other existing legislation.[189] The House Committee on Government Operations stated its intent that the JFK Act would supersede FOIA outright in its report on the legislation: "It is the committee's intent that the narrow criteria set forth in (the grounds for postponement section) will be the only grounds upon which release of assassination materials can be postponed. It is further the intent of the committee that the provisions of the joint resolution shall supersede all specific statutory protections of broad classes of records."[190]

Congressional intent that the JFK Act provide access to more information than is allowed out under FOIA is crucial in light of two recent cases that address the intersection between the two acts. James Lesar, an active Kennedy records litigator, has used the Kennedy Records Act to prompt action on at least two previously filed FOIA cases since the act was passed.[191] The first case, decided by the D.C. District Court on April 29, 1993, tested the idea that the JFK Act would provide for greater access to records under FOIA requests. *Assassination Archives and Research Center v. U.S. Department of Justice*[192] stems from a January 1992 request by the research center to obtain information on an individual who might be linked to the Kennedy assassination. Two documents containing a total of four paragraphs on the person were located, but three of the paragraphs were not turned over to the center.[193] The FBI asserted the right to keep the three paragraphs sealed under the law enforcement exemption of FOIA.[194] The court found that because the records in the case were created during the course of a criminal investigation, "a presumption of confidentiality arises. The plaintiff in this case has not only failed to overcome this presumption, it has put forward no argument or evidence to rebut this presumption."[195]

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[188] Id. at 18-19.

[189] Senate Governmental Affairs Committee hearings, *supra* note 30, at 45 (Statement of Sen. David Boren).

[190] H. Rept. 102-625, Part 1, *supra* note 17 at 34. These broad classes of records specified were classified information (5 U.S.C.(b)(1), law enforcement records (5 U.S.C. § 552 (b)(7), 552(c)), records involving personal privacy (5 U.S.C. § 552(b)(6), 552(a), trade secrets (5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905), taxpayer information (26 U.S.C. § 6103), and intelligence sources and methods (50 U.S.C. § 403g).

[191] A third, Civil Action No. 92-2116, was filed recently, although this case has not yet come available on LEXIS or other published sources. Telephone Interview with James Lesar, president of the Assassination Archives and Research Center, Washington D.C. (Oct. 21, 1993).

[192] 1993 U.S. Dist. Lexis 5569 (Civil Action No. 92-2193) (1993).

The Assassination Archives and Research Center also argued in the case that the JFK Act supersedes FOIA and governs the disclosability of the records sought in the case. However, D.C. District Court review found that the Act did not "provide a new cause of action for the direct release of agency records relating to the Kennedy assassination, nor does it affect the existing law applicable to FOIA requests."[196] While the court acknowledged Congress' finding that FOIA was not working as intended to release the records, it zeroed in on the process established in the Act, namely that agencies were to transfer information to the National Archives, which the Act "presumes" will immediately disclose the records to the public.[197] "Nothing in the Act requires the direct public release of records by government agencies."[198] Likewise, the court rejected the research center's argument that section 6, which detailed the grounds for postponement under the Act, modified the standards under which records may be withheld under FOIA. The grounds for postponing the release of information in the Kennedy Act are "arguably more narrow than the exemptions of FOIA...The section only relates, however, to those records which are forwarded to the National Archives for disclosure or postponement. Nothing in the language of section 6 suggests that those standards should replace the exemptions of FOIA."[199]

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[193] Id.

[194] Specifically, the agency claimed exemptions 5 U.S.C. § 552 (b)(7)(C) and (b)(7)(D) which state that FOIA odes not apply to records compiled for law enforcement purposes that "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonable be expected to disclose the identity of a confidential source."

[195] 1993 U.S. Dist. LEXIS 5569.

[196] Id.

[197] Id.

[198] Id.

The court noted the research center's argument that a section of the JFK Act gave it precedence over all other laws.[200] But the court interpreted this provision to apply to transmission of records to the National Archives, not the general public.[201] The court also found evidence that nothing in the Kennedy Act supersedes FOIA in another section of the JFK Act that states: "nothing in this Act shall be construed to eliminate or limit any right to file requests with any executive agency or seek judicial review of the decisions pursuant to" FOIA.[202] However, the House committee said during hearings on the Act that the section pertaining to Freedom of Information simply allows individuals to continue to file FOIA suits, and that members did not intend for the JFK Act to end to all FOIA requests for assassination information.[203] The section in the JFK Act that allowed for the continuation of FOIA requests was simply intended to guard against information release under FOIA grinding to a halt if compliance with the JFK Act became lax. This intent is clear because Congress removed provisions from earlier versions of the JFK legislation that stipulated that all information should be transferred to the National Archives for review. After fears were expressed that agencies would not be able to continue to process FOIA requests if the materials were moved, the legislation was changed to provide that records set for review are to remain at the agencies pending the review board's decision.[204]

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[199] Id.

[200] Pub. L. No. 102-526 § 11(a) reads: "When this act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code), judicial decision constructing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure, with the exceptions of deed governing access to or transfer or release of gifts and donations of records to the United States Government."

[201] 1993 U.S. Dist. LEXIS 5569.

[202] Pub. L. No. 102-526 at § 11(b).

[203] H. Rept. 102-625, Part 1, *supra* note 17 at 34.

The D.C. District Court did provide a glimmer of hope for the Assassination Archives and Research Center and others seeking information by noting that at the time of its April 29 ruling that "any claim against the FBI for failure to comply with the Act would not yet be ripe."[205] In light of this language from the court, Congress' decision to include provisions for judicial review of final agency actions is significant.[206] The JFK Act also leaves open the possibility of judicial review of review board decisions to postpone the release of documents. The board itself could face direct legal challenges of its decisions because Congress removed the provision giving the review board and its staff immunity from suit.

A second case handled by Lesar, *Sherry Ann Sullivan v. Central Intelligence Agency,*[207] also attempted to link the JFK Act to FOIA requests. In the case, decided by U.S. Court of Appeals for the First Circuit on May 26, 1993, Sullivan was seeking information under FOIA that the CIA had denied. Sullivan's father disappeared shortly before the Kennedy assassination during a flight that may have involved a CIA mission over Cuba.[208] Because the disappearance could have been linked to the Kennedy assassination, Sullivan amended her suit to include the JFK Act shortly after the Act became law.[209] Sullivan asked the federal courts to apply the JFK Act to her request based on a section of the Act that required government offices to give priority to reviewing assassination records "that on the date of enactment of this act are the subject of litigation under" FOIA.[210] The Court of Appeals rejected her claim, ruling that the provision to speed up FOIA requests was directed toward the executive branch, not the courts. The court further suggested that because compilation of records was not complete, the court had no administrative record to "mull" in considering the applicability of the JFK act to the suit.

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[204] Econ. and Commercial Law Subcomm. hearing, *supra* note 22 at 74.

[205] 1993 U.S. Dist. LEXIS 5569 at n3.

[206] Pub. L. No. 102-526 § 11(c), which states "nothing in this act shall be construed to preclude judicial review, under chapter 7 title 5, United States Code, of final actions taken or required to be taken under this act."

[207] 992 F.2d 1249

[208] Id. at 1251.

> Judicial review is merely a safeguard against agency action that proves arbitrary, capricious, or contrary to law, not an option of first resort. We can discern no valid reason to throw caution to the winds, disrupt the orderly workings of the statutory scheme, and instruct the district court to dive headlong into unchartered waters...Since there is no agency action for the district court to review, we decline to participate in so radical an experiment.[211]

VI. CONCLUSION

Even with the release of nearly one million records under the President John F. Kennedy Records Collection Act of 1992, the true picture of the Act's impact remains murky. The only other published analysis of the Act, which appeared shortly after the Act became law, speculated that the law's effect on bringing assassination information into public view might be minimal at best.[212] Despite congressional intent to release more if not all information about the assassination, "the result may be that only heavily redacted, non-informative documents are released, while those with pertinent information are still held secret under the guise of 'national security.'"[213] Even nearly two years after the Act was put in force, assessing assess whether this prediction has become or will become reality is difficult at best. Official documentation of compliance with the Act has not emerged, and the key body charged with overseeing release of the documents has not begun reviewing materials.

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[209] Id. at 1255. The suit was amended between the district court's summary judgment and before the appeal.

[210] Pub. L. No. 102-526 § 5(c)(2)(G)(ii).

[211] 992 F.2d at 1256.

[212] Webster, *supra* note 23 at 17.

[213] Id.

Challenges are just beginning to emerge that may help define the scope and impact of the Act. While caution should be heeded in making gross generalizations from two cases, the two court decisions send a clear signal that at least these two courts are not open to FOIA challenges based on the JFK Act. If anything, the decisions suggest attaching the Act to FOIA requests might not be the most effective avenue for forcing the release of documents. Those seeking access to assassination records might be better served by seeking through court action to force agencies to comply with terms of the JFK Act and release information to the board for review or the Archives for release.

The courts' decisions in the two FOIA cases, coupled with the lack of compliance with the Act by the executive branch, does not bode well for those wishing to let the sun shine on long-secret documents on the assassination. Conceivably, the rulings could remove the teeth from FOIA as it relates to Kennedy records. With much narrower exemptions for withholding or postponing the release of documents in the JFK Act, agencies could become less responsive to FOIA requests. Agencies could contend that if they have complied with the terms of the JFK Act, they have already released all the information that would be available under the much broader exemptions in FOIA. Therefore, no new assassination records would ever be released under FOIA. If an agency has not actually turned over all assassination records under the JFK Act, and if FOIA avenues have been shut off, researchers seeking assassination records might not be any better off -- or might be worse off -- than before the Act was passed. While it remains to be seen what will finally be disclosed under the Act, the measure clearly has not lived up to its potential to provide expeditious release of material the public has been clamoring for during the past 30 years.

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If You Do The Crime, Will You Do the Time?

A Proposal for Reform of

State Sunshine Law Enforcement Provisions

A Paper Presented to the
Law Division of the
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Introduction

The democratic belief that citizens have a right to know and to be informed of the activities of their governmental bodies fueled the passage of legislation establishing the public's right to attend meetings of public bodies. Today all fifty states and the District of Columbia have adopted some form of open meetings or "sunshine" laws. Typically, these statutes include civil and criminal penalties against public officials who commit violations, writs of mandamus or injunctive relief, invalidation of governmental action or other sanctions.

The strongest statutory enforcement provision, however, remains subject to the uncertainties of judicial review. The effectiveness of these legal remedies depends entirely on judicial interpretation, as the court has discretion to decree the relief it deems appropriate.[1] In some states, legislatures have limited or even eliminated the judiciary's freedom to exercise discretion in fashioning or denying relief under sunshine laws.[2] Courts interpreting sunshine laws, however, have been reluctant to accept legislative intent to curtail judicial discretion to fashion suitable remedies for statutory violations. The result is a wide disparity in the use of judicial discretion when ensuring compliance with the laws. In fact, judicial discretion remains the key variable in enforcing sunshine law violations. Determining the extent of this discretion requires an examination of the many appellate decisions regarding enforcement of sunshine laws.

This paper discusses the various remedies provided by state sunshine laws and how appellate courts are interpreting the various enforcement provisions. Through review of appellate court interpretations of enforcement provisions, the paper evaluates the methods for enforcing sunshine laws and the importance of judicial interpretation of statutory enforcement provisions. Finally, the paper offers a state-by-state listing of state open meetings law enforcement provisions and a model enforcement statute.

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[1] D. Dobbs, *Handbook on the Law of Remedies*, § 2.2, at 32 (1993).

[2] William Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524, 533 (1977).

Methodology

The high number of unpublished trial court opinions made it impossible to report the number of sunshine law prosecutions or other quantitative data. Instead, the authors chose to detail the types of enforcement provisions available and how the appellate courts interpret these provisions. The research combined statutory and case law analysis to determine the various remedies in each state and how the courts have interpreted the provisions. The researchers examined all state sunshine laws to determine the remedies available to the courts. Cases were located through a combination of traditional and computer-assisted legal research. First, the researchers included all identified cases discussing either violations of the sunshine laws and/or legal remedies from the enactment of the state's sunshine law. In addition, the researchers employed a computer key-term search to ensure that all reported cases had been located.[3] Other cases were located through *Media Law Reporter*, *American Legal Digests* and other sources.

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[3] Search terms used for both Lexis-Nexis and Westlaw searches were "open or public meetings or proceedings w/5 violation" (for each search, "injunction," "mandamus," "attorneys' fees," "invalidation" and "removal" were substituted for "violation") and "sunshine w/1 law w/5 violation." The statute number, particularly the penalty or enforcement section, was also used to find cases.

The Need For Enforcement

The open meetings concept centers around the belief that public knowledge of the considerations upon which governmental action is based is essential to democracy.[4] The purpose of open meetings laws is to open government proceedings to public scrutiny. Sunshine laws also promote citizen involvement in public policy-making decisions.[5] In other words, the democratic system requires intelligent decisions by its members; intelligent decisions cannot be made unless citizens are well-informed about government activities and the decision-making process.

Sunshine laws also further several other democratic interests. Open meetings allow the input of information and opinions not otherwise available to the government body and increase the public trust by reducing government secrecy.[6] Sunshine laws also serve as a check on corruption, allowing the public to monitor closely the decision-making processes of government bodies.[7] Public access to government meetings also forces public bodies to provide a forum for discussion of public issues.[8]

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[4] *See, e.g.*, J. Wiggins, *Freedom or Secrecy* 3-11 (rev. ed. 1974). For other commentary on sunshine laws, see Note, Iowa Open Meetings Act: A lesson in Legislative ineffectiveness, 62 Iowa L. Rev. 1108 (1977); Thomas Sussman, *The Illinois Open Meetings Act: A Reappraisal*, 1978 S.Ill.L.J. 193; Raymond W. Morganti, *Open Meeting Laws in Michigan*, 52 J. Urb. L. 532 (1976); Note, *New Jersey's Open Public Meetings Act: Has Five Years Brought Sunshine Over the Garden State*? 12 Rutgers L.J. 561 (1981); W. Richard Fossey and Peggy Alayne Roston, *Invalidation as a Remedy for Violation of Open Meeting Statutes: Is the Cure Worse than the Disease*? 1986 U.S.F. L. Rev. 163.

[5] Harold Cross, *The People's Right to Know*, 14-23 (1953).

[6] Ivan Galnoor, ed., *Government Secrecy in Democracy* 1 (1977) (*citing* D. Wise, *The Politics of Lying* 219 (1973)).

[7] *See, e.g.*, Dianne Fossey, *Invalidation as a Remedy for Violation of Open Meeting Statutes*, 1986 U.S.F. L. Rev. 163, 167.

However, many observers argue that absolute openness ignores the realities of effective government.[9] The most commonly cited disadvantages of open meetings include premature disclosure of information placing government at a competitive disadvantage, unnecessary disclosure of personal information involving private persons, reduced efficiency of governmental bodies and undue public pressure on the free exchange of ideas.[10] Sunshine laws attempt to reconcile these concerns while furthering public access to government meetings.

The reality of day-to-day government, however, has little to do with philosophical ruminations on the right to know. Many public officials prefer secrecy over sunshine, and will open their proceedings to the public only if a realistic enforcement threat exists.[11] To this end, most states provide a variety of enforcement powers or legal remedies to deter violations of the sunshine laws. Remedies for sunshine law violations include civil and criminal penalties against the public officials who commit violations, injunctive relief, writs of mandamus, invalidation of governmental action and awards of attorneys' fees for successful sunshine litigants.[12]

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[8] See Wiggins, *supra* note 4.

[9] Joseph Little and Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. Rev. (1975).

[10] Bradley J. Smoot and Louis M. Clothier, *Open Meetings Profile: The Prosecutor's View*, 20 Washburn L. Jrl. 241 (1980-81); see also National Association of Attorneys General, Committee on the Office of Attorney General, *Open Meetings: Exceptions to State Laws* (1990) [hereinafter cited as NAAG, Exceptions to State Laws].

[11] See Smoot and Clothier, *supra* note 10, at 242-47.

[12] For a break-down of the enforcement powers of each state, see Appendix 1.

Enforcement Procedure of State Sunshine Laws

When public officials violate their state's sunshine law, they face either criminal or civil action brought by an individual, the state attorney's office,[13] local prosecutors or an independent commission created to enforce the sunshine law. Most statutes provide that "any person"[14] may file an action, but some states limit standing to "citizens of the state"[15] or to the attorney general or local prosecutor. The Massachusetts sunshine law allows only the attorney general, local district attorneys or "three or more registered voters"[16] to file suit under the sunshine law. New Mexico requires "five citizens" for open meetings lawsuits.[17]

Time often is a factor in sunshine law litigation. Legal actions seeking access to governmental meetings can allow public officials to continue to violate the law as the case winds its way through the courts. In some states, legal actions involving the sunshine law are granted expedited review.[18] For example, New Hampshire's sunshine law states courts must expedite review of sunshine actions for "immediate injunctive relief" if probable cause of a violation exists.[19] However, the majority of states make no provision for expedited review.

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[13] MASS. GRL. LAWS Ch. 39 § 23B (1993).

[14] *See, e.g.*, MINN. STAT. § 471.705(2) (1993); MONT. CODE ANN. § 2-3-213 (1993); N.J. STAT. ANN. 10:4-15 (1993); N.Y. PUB. OFF. LAWS § 107(1) (McKinney 1993).

[15] MO. REV. STAT. § 610.027(1) (Cumm. Supp. 1992).

[16] MASS. GRL. LAWS Ch. 39 § 23B (1993).

[17] N.M. STAT. ANN. § 10-15-3(B) (1993).

[18] *See, e.g.*, N.J. COURT RULES § 4:52, 4:67, 4:69 (1992).

[19] N.H. REV. STAT. ANN. § 91-A:7 (1993).

Writs of Mandamus and Declaratory Judgments

At common law, the writ of mandamus was the only procedural means to enforce the right to attend public meetings.[20] Mandamus is a writ issued from a high court to an inferior court or to a municipal corporation to restore a right that has been illegally deprived.[21] If a public body violates a writ of mandamus, it can be held in civil contempt.[22] Writs of mandamus order future compliance with the sunshine law if a potential violation seems likely.[23] Seventeen state sunshine laws provide for writs of mandamus ordering future governmental meetings to be held in compliance with the law.[24]

A writ can quickly stop illegal meetings which sometimes continue despite the filing of a complaint in the absence of an injunction. For example, in *Worden, Montana v. County of Yellowstone*,[25] the Montana Supreme Court overruled a trial court's denial of a writ compelling the Yellowstone County Commissioners to stop holding private meetings over the phone. Members of a local school board opposed to a proposed subdivision filed for a writ of mandamus after the commissioners voted by telephone to approve the subdivision. The trial court dismissed the case, ruling that while the teleconference failed to comply with the open meetings law, the "sense of urgency" surrounding the board's decision forced the commissioners to meet by telephone.[26] In addition, the lower court found that a writ of mandamus is not a proper remedy to correct action which has already taken place.[27]

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[20] Peter Guthrie, *Annotation: Validity, Construction and Application of Statutes Making Public Proceedings Open to the Public*, 38 A.L.R. 1070, 1091 (1991).

[21] *Blacks Legal Dictionary* (rev. ed. 1993).

[22] Dobbs, *supra* note 1.

[23] *See, e.g.*, AZ. REV. STAT. § 38-431.04 (1993).

[24] *See, e.g.*, LA. REV. STAT. ANN. § 42:11(A) (1993); IOWA CODE ANN. § 28A.6 (West Supp. 1993).

[25] 606 P.2d 1069 (Mt. 1980).

The Montana Supreme Court agreed that under Montana law, a writ of mandamus can not correct past actions. However, the court found that a writ of mandamus ordering the board to cease holding telephone conferences in violation of the sunshine law was the only way to ensure public access to future commission meetings.[28] Recognizing that its action was "not textbook law," the Montana Supreme Court issued a writ of mandamus ordering the commission to comply with the sunshine law.[29]

In many instances, genuine questions arise over the sunshine law. To protect citizens seeking clarification of the sunshine law, 13 state sunshine laws allow citizens to seek a declaratory judgment on open meetings issues. A handful of states allow public officials to seek declaratory judgments.[30] A declaratory judgment is a prospective ruling from the court on whether a certain procedure will violate the sunshine law. As a prospective measure, declaratory judgments do not provide for penalties. Some state courts encourage public agencies to seek declaratory judgments by requiring a mere showing that an unanswered legal issue exists,[31] while other state courts issue declaratory judgments only as a last resort.[32]

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[26] *Id.*

[27] *Id., citing* Melton v. Oleson, 530 P.2d 466 (Mt. 1974).

[28] *Id* at 1070.

[29] *Id.*

[30] *See, e.g.*, MO. REV. STAT. § 610.027(5) (Cumm. Supp. 1992).

[31] LA. REV. STAT. ANN. § 42:11(A) (1993); IOWA CODE ANN. § 28A.6 (West Supp. 1993).

Depending upon statutory construction, declaratory judgments allow citizens and/or public officials to seek judicial clarification of the sunshine law before they decide whether to close a meeting. For example, in *Binghamton Press v. Board of Education of Binghamton*,[33] two reporters asked the New York courts to determine whether a school board's planned "work session" would violate the state's open meetings law. The court reviewed the board's agenda and found that the work session was scheduled to discuss the consolidation of two city high schools.[34] The court ruled that school consolidation was a matter of "substantial public interest" and issued a declaratory judgment instructing the board that such a work session would constitute a violation of the sunshine law.[35]

Through the use of declaratory judgments, open meetings questions can be answered without the time and expense of litigation. More importantly, the governmental body has no excuse for holding a closed meeting in violation of the law without first seeking a declaratory judgment. The judgments also serve an important educational purpose, as officials throughout a state can profit from judicial clarification of the law. Declaratory judgments make it more difficult for public officials to claim they acted in "good faith" out of ignorance of the law and encourage public officials to learn more about the sunshine law without facing fines, jail terms or removal from office.

Injunctions

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[32] IND. CODE ANN. § 5-14-1.5-7(b)(1) (Burns Supp. 1993).

[33] 67 A.2d 797 (N.Y. 1979).

[34] *Id.* at 798.

[35] *Id.* at 800.

An injunction is an equitable remedy that prohibits or permits someone to do some act.[36] As applied to state sunshine laws, injunctions are frequently sought to stop a public body from conducting a meeting in violation of the law. Injunctions are moderate enforcement provisions. They avoid the immediate imposition of criminal sanctions or money damages, and allow the public body a chance to right past wrongs. Most importantly, an injunction merely directs the defendant to avoid future violations; the threat of contempt proceedings if additional violations occur helps ensure compliance.[37] The vast majority of the 32 state sunshine laws which provide for injunctions, however, state that the court "may" issue injunctions upon "good cause shown," leaving the courts substantial discretion in applying injunctive relief.[38]

Such discretionary statutory language has produced many decisions in which state courts refuse to enjoin meetings for want of definitive proof that the sunshine law will be violated. In *Marsh v. Richmond Newspapers*,[39] the Virginia Supreme Court held that Richmond Newspapers failed to prove that future violations of the sunshine law were probable despite the fact that a city council twice had violated the law. In *Marsh*, Richmond Newspapers alleged that the Richmond City Council had violated the sunshine law by improperly holding an executive session and by discussing subjects during the closed session which did not fall within the "legal matters" exemption to the law.[40] The newspaper sought to enjoin the council from closing future meetings.

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[36] Dobbs, *supra* notes 1, 22.

[37] Oliver Fiss and David Rendleman, *Injunctions* 104 (2d ed. 1984).

[38] *See, e.g.*, ALA. CODE § 13A-14-2 (1993).

[39] 288 S.E.2d 415 (Va. 1982).

[40] *Id.* at 416-19.

The trial court found that the council had committed both violations and granted a permanent injunction.[41] On appeal, the Virginia Supreme Court dismissed one violation, but affirmed the trial court's ruling that the council had discussed topics outside the scope of the "legal matters" exemption. Despite this conceded violation, the Virginia Supreme Court dismissed the injunction, holding that a single violation was not proof that future violations were probable.[42] Relying on the council members' statements that "they did not mean to do anything wrong,"[43] the court refused to enjoin the council from holding illegal meetings in the future. In a companion case, *Nageotte v. King George County*,[44] the Virginia Supreme Court also refused to issue an injunction where the defendants had violated the law in good faith.

Neither claims of good faith nor subjective evaluations of the nature of the violation, however, should determine the propriety of an injunction. Dismissal of injunctions based on good faith arguments serves only to undermine the effectiveness of sunshine laws. If a defendant's good faith leads the court to refuse an injunction in the belief that future violations will not occur, and if the court declares that unintentional, unsubstantial violations will not be subject to injunctions, then defendants are more likely to ignore the law. The court's -- and in some cases the state legislature's -- refusal to take action against officials who commit "honest mistakes" removes any deterrent incentive for officials to avoid careless violations of the act.[45]

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[41] *Id.*

[42] *Id.* at 442.

[43] *Id.*

[44] 288 S.E.2d 423 (Va. 1982).

[45] Some state statutes allow for "good faith" violations. For example, the Virginia Freedom of Information Act allows the imposition of all enforcement provisions only for "willful" violations. Va. Code § 2.1-346.1 (1993). See also Barry Knoth, *The Virginia Freedom of Information Act: Inadequate Enforcement*, 25 Wm. & Mary L. Rev. 487, 502 (1984).

A violation of the act often should result in an injunction, which will help deter future violations. An injunction gives public officials an incentive to study the law rather than to proceed to close the meeting only to claim later that they acted in good faith. Whether a defendant acts in good or bad faith, the same harm results to the public's right of access. The objective of the enforcement provisions should be to prevent all violations, whether in good or bad faith. Punishing all violations equally also encourages other public officials throughout any state to become more familiar with their state's sunshine law, enhancing its deterrent effect on future meetings.

Subjective factors such as a public official's reputation, a public body's attitude toward the sunshine law or pattern of compliance with the sunshine law often hold sway when courts are considering enjoining a public body from closing a meeting. Courts have considered whether a promise of future compliance is sufficient to enforce the sunshine law. For example, the Arizona Court of Appeals for Division One in *Carefree Improvement Association v. City of Scottsdale*[46] instructed lower courts to "consider the overall behavior of the public body" when considering injunctive action.[47]

The appellate court in *Carefree* upheld a trial court's finding that Scottsdale city officials failed to provide notice of an emergency annexation hearing in violation of the sunshine law. The *Carefree* court based its decision to enforce the sunshine law on "a misleading element inherent in the circumstances," finding that city officials had every opportunity to provide adequate notice of the meeting.[48] Instead of simply finding that a violation had occurred triggering the injunction, the court reviewed the record to determine whether the officials "intended to mislead" the public.[49] The Arizona open meetings law, however, says nothing about intent or other subjective factors.[50] The *Carefree* nevertheless interpreted the law as allowing violations so long as there "has been substantial compliance...with good faith present."[51] Under the *Carefree* court's analysis, multiple violations must occur before the court finds sufficient grounds for relief.

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[46] Carefree Improvement Association v. City of Scottsdale, 649 P.2d 985 (Ariz. Ct. App. 1982).

[47] *Id*. at 1002.

Other state courts require defendants to demonstrate that they acted unintentionally. Action on the part of public bodies such as providing notice of public meetings in a variety of outlets and strict adherence to technical provisions such as the keeping of minutes are helpful but still allow repeat offenders to go unpunished. These factors should not play a significant role in a court's decision to issue an injunction, whether the court considers other factors or raises the burden of proof for establishing good faith. Rather than leaving injunctive relief to a court's discretion, state legislatures should make injunctions mandatory for all violations of the sunshine law. Specific statutory language would remove any doubt concerning legislative intent. Even if the courts were certain that officials would comply with the law in the future, the courts could not refuse to grant injunctions.

Injunctions further public access by at least temporarily halting closed meetings. Forty-eight of the fifty-one sunshine laws require advance notice of closed meetings, so the majority of state courts have an opportunity to consider an injunction when the possibility of a sunshine law violation exists. State legislatures should amend their sunshine laws to require the courts to consider enjoining any closed meeting if the meeting presents an issue unresolved by previous litigation. North Carolina's open meetings law, for example, authorizes the courts to enjoin threatened, recurring or continuing violations of the statute.[52] This statute spares the public and public officials the more serious legal consequences of violations, including invalidation of action taken during the closed meeting, civil fines, criminal penalties or even removal from office.

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[48] *Id.*

[49] *Id.*

[50] AZ. REV. STAT. 38-431.07 (A) (1993).

[51] *Id.* at 1000.

Invalidation

In addition to injunctions and writs of mandamus, thirty-eight states provide for invalidation of decisions made in illegally closed meetings.[53] Invalidation or voiding of government actions denies public officials the benefits of secret meetings and forces the governmental body to revisit in public any decision previously made behind closed doors. Invalidation serves as both a deterrent and a remedial sanction, protecting the public from the consequences of decisions made in secret.[54]

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[52] N.C.G.S. § 143-318(16)(B) (Michie 1993).

[53] *See, e.g.*, ALAS. STAT. § 44.62.310 (1993); AZ. REV. STAT. ANN. § 38-431.05 (1993); COLO. REV. STAT. § 24-6-402(4) (1993); FLA. STAT. ANN. § 286.011 (West Supp. 1993); MO. ANN. STAT. § 610.027 (Vernon 1992); N.M. STAT. ANN. § 10-15-3 (1993); PA. STAT. ANN. tit. 65, § 262 (Purdon Supp. 1993); WIS. STAT. § 19.97(3) (Supp. 1993); WYO. STAT. § 16-4-403 (1993).

[54] Reed v. Richmond, 582 SW2d 651 (Ky. 1979) (injunction is only immediate was to force public bodies to comply with sunshine law).

Invalidation provisions vary from state to state. Eleven states automatically invalidate any decision made in violation of the sunshine law,[55] while others invalidate only upon proof of "willful violation."[56] Others provide exceptions for decisions on public contracts or the public debt and other issues.[57] Still other states set time limits on the period following a violation during which invalidation may be sought.[58] The time limits vary from thirty days in West Virginia[59] to one year in Nebraska.[60]

Like injunctions, invalidations have been denied in several cases where the government body argued that the sunshine law violation was inadvertent or based on a technicality in the law.[61] Cases from throughout the country illustrate that courts are unwilling to nullify an otherwise sensible decision taken in a meeting which only technically violates the sunshine law.[62] For example, an Arizona appellate court ruled in a 1979 case that a board of education's refusal to allow videotaping of a board meeting constituted "a technical violation" which would not invalidate the board's decision, despite a provision in the Arizona open meetings law providing "an absolute right" to record any public meeting.[63] The ruled that a technical violation would not nullify all business conducted at an illegal meeting so long as the meeting complies with "the spirit of the law."[64]

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[55] *See, e.g.*, ALAS. STAT. § 44.62.310 (1993); AZ. REV. STAT. ANN. § 38-431.05 (Supp. 1993); ARK. STAT. ANN. § 12-2805 (1992).

[56] *See, e.g.*, HAW. REV. STAT. 92-11 (1993); MD. CODE ANN. § 10-510(d)(4) (1993).

[57] *See, e.g.*, IND. CODE ANN. § 5-14-1.5-7(b) (Burns Supp. 1993); MD. CODE ANN. § 10-510(a)(1) (1993); TENN. CODE ANN. § 8-44-105 (1993).

[58] *See, e.g.*, GA. CODE ANN. § 50-14-1 (Supp. 1993); HAW. REV. STAT. ANN. § 92-11 (1992); N.J. STAT. ANN. § 10:4-15 (West Supp. 1992-93).

[59] W.VA. CODE § 6-9A-6 (Supp. 1993).

[60] NEB. REV. STAT. ANN. § 84-1414 (Supp. 1993).

[61] *See, e.g.*, Goldman v. Zimmer, 64 Ill. App. 2d 277, 212 N.E.2d 132 (1969); State ex rel. Humphrey v. Adkins, 18 Ohio App. 2d 101, 247 N.E.2d 330 (1969); Stinson v. Board of Accountancy, 625 S.W.2d 589 (Ky. App. 1981).

[62] *See, e.g.*, Bradford Area Educ. Ass'n. v. Bradford Area School District, 572 A2d 1314 (Pa. 1990) (trial court did not abuse its discretion by refusing to invalidate school reorganization plan, even assuming board held meetings in technical violation of the sunshine law, because delay in implementing plan would harm students); Rehabilitative Hospital Services v. Delta-Hills Health System Agency, 687 S.W.2d 840 (Ark. 1985) (invalidation is available only if

Similarly, the South Dakota Supreme Court held in a 1984 case that although a school board's "executive session" violated the state's sunshine law, the session was a "technical violation" since the sunshine law's intent was met at public meetings held earlier. In *Olson v. Cass*,[65] several citizens sought invalidation of the Agar School District Board of Education's decision to close a local high school made during an "executive session."[66] The court found that the public was not given an opportunity to discuss the school closure before the vote was taken and that the board did not disclose the voting record.[67] Despite statutory provisions prohibiting both secret voting and school board executive sessions,[68] the South Dakota

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administrative remedies have been exhausted, the plaintiff seeks to vindicate the public interest rather than private concerns, and only if the violation is "substantial."); Wilmington Federation of Teachers v. Howell, 374 A.2d 832 (Del. 1977) (overturning invalidation order from lower court "absent specific statutory provisions"); Kane v. County Board of School Trustees, 376 N.E.2d 1054 (Ill. 1978) (sunshine law does not mandate invalidation, but leaves it at the discretion of the court).

[63] Karol v. Board of Education Trustees, 593 P.2d 649 (1979)(citing AZ. REV. STAT. § 38-431.01(D)).

[64] *Id.*

[65] 349 N.W.2d 435 (S.D. 1984).

[66] *Id.* at 435-36.

[67] *Id.*

[68] *Id.* at 436, *citing* S.D. LAWS § 1-25-1 (1984).

Supreme Court found that the purpose of the sunshine law had been met at previous meetings. Because "the electors had an ample opportunity to educate themselves on the issues and to be heard regarding their opinions on the various alternatives"[69] at prior meetings on school closure, the court refused to invalidate the decision.

Other courts have refused to invalidate decisions made in violation of the sunshine law so long as there is substantial compliance with the act.[70] For example, an Iowa appellate court in 1981 refused to invalidate a decision discharging a school superintendent even though three members of the board admitted to holding several discussions on the issue prior to the meeting at which the vote to consider termination was taken. In *Wedergren v. Board of Directors*,[71] the school board members admitted violating the act on several occasions before meeting to fire the superintendent. The court, however, found that by providing public notice and by allowing public discussion at the meeting at which the vote took place, the board members complied "substantially with the intent of the law."[72]

Another Iowa case, *Dobrovolny v. Reinhardt*,[73] illustrates the difficulties of invalidating decisions affecting entire communities. In *Dobrovolny*, a citizen sought an injunction forbidding implementation of a school board decision to redistrict the local school system. The school board's decision had been made at a meeting held without adequate notice in violation of the

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[69] *Id.* at 437.

[70] *See, e.g.*, Karol v. Board of Education Trustees, 593 P.2d 917 (Ariz. Ct. of App. 2d Div. 1978); City of Flagstaff v. Bleeker, 600 P.2d 49 Ariz. 1970).

[71] 307 N.W.2d 12 (Iowa 1981).

[72] *Id.* at 13.

[73] 173 N.W.2d 837 (Iowa 1969); also see Note, *Dobrovolny v. Reinhardt*, 53 Iowa L. Rev. 210 (1972).

Iowa Open Meeting Act.[74] The board, however, argued that its actions were justified by a legislative deadline for redistricting.[75] A majority of the Iowa Supreme Court agreed that a violation had taken place, but found no reason to enjoin the board's action since it faced the legislative deadline. The court denied the injunction, holding that "[r]ights already lost and wrongs already committed are not subject to injunctive relief... when there is no showing that the wrong will be repeated."[76] The dissent argued that the court should have nullified the decision even if the board would simply repeat the action at a public meeting, stating that "the majority says... that because the meeting is over and done with the courts are powerless to (or will not) interfere...This will always be the case."[77]

Allowing government decisions made following inadvertent or good faith violations of state sunshine laws to stand uncorrected robs the public of the remedial power of invalidation. Unlike punitive measures, invalidation forces officials to revisit decisions made in violation of the sunshine law. Invalidation addresses the secret decision-making that sunshine laws were created to address without subjecting government officials to any further punishment. Intent or prior knowledge should have no bearing on whether a decision made in violation of the law should stand. If the government decision frustrates the purpose of the sunshine law, it should be corrected through invalidation.

Other states limit the effectiveness of invalidation by allowing courts to invalidate only formal or final actions while ignoring deliberations held in violation of the sunshine law.[78] Still other states allow public agencies to "cure" sunshine violations by revisiting the decision in a public meeting.[79] For example, New Jersey[80] and Michigan[81] both set forth statutory procedures for curing sunshine laws through subsequent public voting. These provisions allow informal votes in which the government body deliberates secretly before bringing the matter before the public for a quick vote without further discussion.[82] The public witnesses only the vote and leaves the meeting with no knowledge of the reasons for the decision.

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[74] 173 N.W.2d 837, 839.

[75] *Id.* at 841.

[76] *Id.* at 841.

[77] *Id.* at 842.

For example, in *State ex rel. Roark v. City of Hailey*,[83] the Idaho Supreme Court refused to invalidate a city council vote following four private "work sessions" because no "firm and final decisions" were made at the work sessions.[84] The court first found that "work sessions" were subject to the open meetings law, but reasoned that the work sessions were merely preliminary to final action and concluded that none of the officials considered themselves bound by their opinion expressed in the closed meetings.[85] Despite statutory language directing the courts to void "any action taken at any meeting" which fails to comply with the Idaho Open Meetings Act,[86] the court ruled that decisions are made only when a final vote is taken on a public issue.[87]

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[78] *See, e.g.*, NEB. REV. STAT. §84-1414(1) (1993); VA. CODE § 2.1-344 (Supp. 1993).

[79] See, e.g., *Reed v. City of Richmond*, 582 S.W.2d 651 (Ky. Ct. App. 1979) (where a court invalidates a decision for failure to comply with the open meetings law, the body may elect to reconsider the matter at a properly held meeting); Delta Devp. Corp. v. Plaquemines Parish Comm. Council, 451 So.2d 134 (La. App. 4th Cir. 1983), *cert denied*, 456 So.2d 172 (La. 1984) (court refused to invalidate a decision because the public body subsequently ratified the resolution made in an illegal meeting in an open meeting).

[80] N.J. REV. STAT. § 10:4-15 (Supp. 1993) (stating that a public body may remedy decision made in violation of the sunshine law by "reenacting the decision at a public meeting.")

[81] MICH. LAWS § 15.270(5) (1993). (stating that decisions made in violation of the sunshine law may be reenacted "without being deemed to make any admission contrary to its interest.")

[82] See Knoth, "Virginia Freedom of Information Act," 25 Wm. & Mary L. Rev. 487, 511-12.

[83] 633 P.2d 576 (Idaho 1981).

[84] *Id.* at 579.

Thus, the *Roark* court limited invalidation sanction to final actions, practically eliminating public access to deliberative meetings in which the reasons for government decisions are made.[88] Under the court's reasoning, government officials need only to state that they remained open-minded regardless of what they decided in the work session. This type of "quasi-secret" voting certainly frustrates the purpose of sunshine laws and can be remedied by statutory language providing that no action can be taken at a government meeting following closed deliberations conducted in violation of the act.[89]

Other courts allow public bodies to rectify decisions made in violation of the law through independent judicial review of the decision. In other words, the court asks another court to review the decision to determine whether the sunshine law violation played a role in how the decision was made. In *Alaska Community Colleges' Federation of Teachers v. University of*

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[85] *Id.*

[86] IDAHO CODE § 67-2347 (as cited 1981, currently codified at IDAHO CODE § 67-2347 (1993)).

[87] *Id.*

[88] See *Baker v. Independent School Dist.*, 691 P.2d 1223 (Idaho 1984) (where deliberations are conducted at a meeting violative of the Open Meetings Act but no final decision is made, the illegal meetings will not invalidate subsequent action taken in compliance with the act).

[89] For another example of this phenomenon, see Grein v. Board of Education, 343 N.W.2d 718 (Neb. 1984) In *Grein*, the court an injunction was unnecessary because the school board's decision to accept a bid was only "crystallized" in closed session, while the actual vote was taken in a public meeting.

Alaska,[90] a teachers' union filed suit seeking to invalidate the merger of two colleges in the University of Alaska system. The union claimed that the Alaska Board of regents made the merger decision in an illegal executive session on November 6, 1979.[91]

The superior court agreed with the union but, contrary to the open meeting law's directive that "action taken contrary to [the provisions of the law] is void,"[92] did not invalidate the decision. Instead, the court ordered the university to hold a properly noticed meeting and reconsider the previous decision.[93] Acting on the court's order, the board affirmed its earlier decision in a public meeting held on July 30, 1981. Satisfied with the board's public meeting, the court dismissed the union's sunshine law claim.[94] The union, dissatisfied with the resultant decision, appealed the superior court's decision. On February 3, 1984, three years and three months after the board approved the merger, the Alaska Supreme Court ruled that the lower court should have either invalidated the board's decision or let it stand.[95] After giving the lower court guidelines for determining whether or not the meeting was in violation of the sunshine law, the Alaska Supreme Court remanded the case to the superior court for a new trial.[96] Meanwhile, the board's merger plans were placed in limbo, as the courts struggled to decipher the state's sunshine law. Despite a concise statutory order to invalidate any action in violation of the sunshine law, the superior court later ruled that public bodies have an opportunity to cure violations through judicial review of the illegal decision.[97]

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[90] 677 P.2d 886 (Alaska 1984).

[91] *Id.* at 888.

[92] ALAS. STAT. § 44.62.310(f) (1993).

[93] *Id.*

[94] *Id.*

[95] *Id.* at 892.

[96] *Id.*

Civil Penalties

Seventeen states currently provide for fines ranging from $2,000 for a second violation in Michigan[98] to not more than $50 in Kentucky[99] for violations of the sunshine law. The judicial standard for civil penalties is often dispositive. In Florida, civil penalties may be awarded if a preponderance of the evidence demonstrates a violation of the law.[100] However, many states limit civil fines to "willful and knowing violations," creating yet another vast area of judicial discretion.[101]

The civil fines provisions currently in effect across the nation place a negligible financial burden upon an official who knowingly violates a state law. Indeed, courts have stated that the adverse publicity and political damage resulting from civil fines serve as the real deterrent factor.[102] The "willful and knowing" requirements in many state sunshine laws seek to protect "good faith" violators from financial and political punishment, but courts have struggled to separate "good faith" violations for more lenient treatment.[103]

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[97] *Id. Also see* Brookwood Area Homeowners Association v. Anchorage, 702 P.2d 1317 (1985).

[98] MICH. COMP. LAW § 15.272(2) (1992).

[99] KY. REV. STAT. 61.991(1) (1993).

[100] See State v. Chiaro, Case No. 90-39277 TI40A (Co. Ct. Broward Co., January 24, 1991).

[101] *See, e.g.*, KY. REV. STAT. 61.991(1) (1993) (any person who "knowingly" attends a meeting violative of the sunshine law); VA. CODE § 2.1-346.1 (1979) ("if it finds a violation was willfully and knowingly made, [a court] shall impose a civil fine."); IOWA CODE § 67-2347(2) (1993) (fines for officials who "knowingly conduct or participate in" a meeting violative of the sunshine law).

A possible answer to the "good faith" loophole exists in New Jersey's Open Public Meetings Act[104], which protects from civil penalties officials who protest a closed meeting later found to violate the law.[105] The objection must be publicly stated and entered into the minutes of the meeting at which the violation occurs. This provision protects officials who argue unsuccessfully to open the meeting, enabling them to remain on the job despite their misgivings. The Iowa Open Meetings Act also contains protections from civil damages for officials who can show they voted against closing the meeting or that they reasonably relied upon a court decision or attorney general's opinion to decide to close the meeting.[106]

Civil fines are important to enforcement of state sunshine laws, for they focus on individual actions rather than group decisions. The requirement of willful and knowing violations protects the "good faith" violator, reserving financial punishment only for officials who deliberately deny public access to meetings in violation of the sunshine law. The deterrent effect of civil penalties, whether financial or political in nature, is an effective use of force against deliberate violators.

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[102] *Grein v. Board of Education*, 343 N.W.2d 718 (1984).

[103] *See, e.g.*, Orange County Publications v. County of Orange, 120 A.D.2d 596 (1986) (court expressed reluctance to reject good faith arguments).

[104] N.J. STAT. ANN. § 10: 1-17 (West 1992).

[105] Id., § 10:4-17. *See also* Note, "New Jersey's Public Meetings Act: Has Five Years Brought 'Sunshine' Over the Garden State?," 12 *Rutgers L.Jrl.* 561, 575-76 (1981).

[106] IOWA CODE § 21.6(3)(a) (1993).

Criminal Penalties

Another enforcement procedure common to state sunshine laws is the imposition of criminal sanctions. Sixteen state sunshine laws contain criminal penalties for violations of the sunshine law, with misdemeanor sentences ranging from 60 days and/or a $500 fine in Florida[107] to not more than $100 in South Dakota.[108] Criminal sanctions appear infrequently in the cases studied, probably because most states require a "willing and knowing" violation to apply both civil and criminal penalties.[109] Despite the obvious deterrent value of criminal penalties, some prosecutors are hesitant to bring political charges against their political brethren simply for conducting an illegal meeting.[110] Other commentators argue that prosecutors may selectively enforce the sunshine laws, choosing to pursue criminal charges only against their political enemies.[111] With similar standards of proof, most prosecutions which have risen to the appellate level involve civil actions. Finally, the possibility of criminal sanctions may discourage some qualified candidates from seeking public office.[112]

These disadvantages have limited the use of criminal penalties in many states whose sunshine laws provide for such sanctions. Other states have rejected criminal provisions altogether, relying instead upon invalidations, injunctions or civil penalties.[113] Nevertheless, officials have been convicted in Florida[114] and Minnesota[115], among others.

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[107] FLA. STAT. 286.011(3)(b) (1993).

[108] S.D.C.L. § 22-6-2 (1993).

[109] *See, e.g.*, FLA. STAT. 286.011(3)(b) (any official who *knowingly* violates the sunshine law);

[110] Knoth, *supra* note 82, at 512-13.

[111] Jonathan Sutherland, *Statutes and Statutory Construction* § 46.01 (4th ed. 1973); Note, *New Jersey's Open Public Meetings Act*, 12 Rutgers L.J. 561, 575-76 (1981).

[112] See Knoth, *supra* notes 82, 110, at 513.

Awards of Attorneys' Fees

Provisions for the recovery of attorneys' fees have become increasingly prevalent in state sunshine laws. While no state expressly denies recovery of attorneys' fees under the sunshine law, twenty-three states do not expressly include attorneys' fees within the law. The twenty-eight sunshine laws providing for attorneys' fees contain different standards for recovery of fees. Some states simply provide that the complainant must prevail,[116] while other states require the courts to find that the governmental body or official acted "unreasonably," "in bad faith," "frivolously"[117] or to find that the government's action was "knowing and intentional,"[118] or "totally lacking in merit."[119] Pennsylvania's sunshine law awards attorneys' fees only for

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[113] *See, e.g.*, IND. CODE ANN. § 5-14-1.5-7 (Burns Supp. 1993); LA. REV. STAT. ANN. § 42:9 (West Supp. 1993).

[114] *See, e.g.*, Wolfson v. State of Florida, 344 So.2d 611 (Fla. 1st DCA 1977) (city commissioner who "willfully and knowingly" violated the sunshine law by holding a series of closed meetings convicted of criminal charges).

[115] Unpublished trial court opinion. See Larry Oakes, "Four on Hibbing council found guilty of violating meeting law," *Minneapolis Star-Tribune*, Oct. 20, 1992, at 3B.

[116] *See, e.g.*, AZ. REV. STAT. § 38-431.07(A) (1993); DEL. CODE ANN. § 10005(d) (1993); HAW. REV. STAT. § 92-12(c) (1993); IND. CODE § 5-14-1.5-7(c)(Supp. 1993); VA. CODE ANN. § 2.1-346 (Supp. 1993).

[117] COLO. REV. STAT. § 24-6-402(9) (1993).

[118] IND. CODE ANN. § 5-14-1.5-7(f) (Burns Supp. 1993).

[119] CAL. GOVT. CODE § 54960.5 (1993).

"legal challenges commenced in bad faith."[120] Other states award court costs and fees to the defendant governmental body when a claimant's suit is "clearly inadequate,"[121] or "without substantial justification."[122]

Plaintiffs required to prove that an agency's action was, for example, "totally lacking in merit," in order to win attorney's fees may face impossible legal hurdles. In *Common Cause v. Stirling*,[123] a California appellate court upheld a trial court's order denying the activist group attorney's fees despite several admitted violations by the San Diego City Council.[124] In January 1977, six members of the San Diego City Council wrote a private letter ordering the city manager to condemn two pieces of property the council wished to purchase for a planned city park.[125] Common Cause learned of the secret correspondence and filed an action for declaratory relief under the Brown Act, California's sunshine law for local government bodies. At trial, the council members admitted that they met secretly to draft the letter and told no one of the correspondence.[126] The trial court found the meeting and its resultant letter violated the Brown Act, but refused to grant attorney's fees to Common Cause because it found that the council's action was not "totally lacking in merit."[127]

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[120] 65 PA. STAT. § 283 (1992).

[121] VA. CODE ANN. § 56-234.3 (Supp. 1993).

[122] GA. CODE ANN. § 50-14-5(b) (Supp. 1993).

[123] 119 Cal. App. 3d 658 (Cal. 4th Dist. Ct. App. 1981).

[124] *Id.* at 660.

[125] *Id.*

[126] *Id.*

[127] *Id.*

Lacking any statutory guidance as to actions "totally lacking in merit," the appellate court turned to cases involving attorneys' fee awards under other statutes. Incorporating the California Code of Civil Procedure's requirement that fees are to be awarded for cases resulting in "[the] enforcement of an important right affecting the public interest,"[128] the court found that Common Cause's action was not significant to "all people of the state of California" but only to Common Cause.[129] In addition, the court found that the council may have believed that the Brown Act did not apply to correspondence between council members.[130] Thus, based on the Code of Civil Procedure's public interest standard, the court concluded that the city council's action was not "totally lacking in merit" and denied attorney's fees to Common Cause.[131] The Court of Appeals of California's decision in *Stirling* effectively eliminated the possibility of attorney's fees awards in California for lawsuits based on the Brown Act. If repeated violations of the sunshine law conceded by the public official are insufficient to prove that a government body's action is "totally lacking in merit," it is difficult to envision a scenario in which attorney's fees would be awarded under the act.

Unlike California's Brown Act, other state open meeting laws require the courts to award attorneys' fees if the court determines that a violation has occurred. Florida's sunshine law states that if the court finds a violation, "the court shall assess a reasonable attorney's fee against such agency."[132] The directive "shall," as opposed to "may" or other discretionary language, requires Florida courts to award attorney's fees whenever an agency is in violation of the sunshine law. Florida courts have awarded attorney's fees in dozens of reported cases,[133] and the Florida Supreme Court has stated that fees are to be awarded to any plaintiff who prevails in a sunshine action.[134] Florida courts may also assess attorney's fees against a plaintiff who sues under the sunshine law and fails to present facts which create a justifiable legal issue.[135]

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[128] *Id.* at 661 (*citing* CAL. CODE CIV. PROC. § 1021.5).

[129] *Id.* at 664.

[130] *Id.*

[131] *Id.* at 665.

[132] FLA. STAT. § 286.011(4)(1993).

The awarding of attorneys' fees is critical to securing the rights guaranteed by the statute. Without the hope of attorneys' fees for those denied access, those seeking access to governmental meetings must bear the often overwhelming financial burden of litigation. Public officials can violate the law with impunity if they realize that the individual or group of individuals seeking access cannot afford a lawsuit. Thus, attorneys' fee provisions help ensure that the public's right to attend governmental meetings does not depend upon the individual's bankroll.

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[133] For a breakdown of reported attorneys' fee awards in Florida under the state's access laws, see "Attorneys' Fee Awards Useful Tool for Enforcing Access Laws," *Brechner Report*, April 1994 (on file with author). *Also see, e.g.*, Town of Palm Beach v. Gradison, 222 So.2d 470 (Fla. 2d DCA 1969); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973); Wood v. Marston, 442 So.2d 934 (Fla. 1983); City of Fort Walton Beach v. Grant, 544 So.2d 230 (Fla 1st DCA 1989).

[134] Wood v. Marston, 442 So.2d 934 (Fla. 1983).

[135] See Bland v. Jackson County, 514 So.2d 1115 (Fla. 1st DCA 1987).

Removal from Office

Seven states provide for the removal from office of officials who repeatedly violate open meetings laws.[136] Removal from office is a strong deterrent because it allows the prosecutor to single out unrepentant violators for the ultimate punishment while sending a strong signal to officials throughout the state that violations of the sunshine law will not be tolerated by the courts. Of the seven states that currently provide for removal from office, four do not require repeated violations for removal.[137] Iowa and Minnesota allow discretionary removal for the second sunshine violation and make removal mandatory upon the third violation.[138]

In 1990, a Minnesota appellate court found that six school board members who repeatedly violated the sunshine law could be removed from office if the violations were intentional. In *Willison v. Pine Point Experimental School*, the Court of Appeals of Minnesota overruled a trial court's ruling dismissing the case because the violative meetings were "related and continuous in nature."[139] The appellate court found that the open meetings law does not require that the meetings be separate and unrelated remanded the case to the trial court for reconsideration.[140]

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[136] *See* AZ. REV. STAT. § 38-431.07(A) (1993); ARK. STAT. ANN. § 25-19-107 (1993); FLA. STAT. § 112.52 (1993) (granting Governor power to remove any public official indicted for a misdemeanor arising directly from the official's public duties); HAW. REV. STAT. § 92-13 (1993); IOWA CODE ANN. § 28A.6(3)(d)(West Supp. 1993); MINN. STAT. § 471.705(2) (Supp. 1993); OHIO CODE ANN. § 121.22(H) (Supp. 1993).

[137] See AZ. REV. STAT. § 38-431.07(A) (1993); FLA. STAT. § 112.52 (1993); HAW. REV. STAT. § 92-13 (1993); OHIO REV. CODE ANN. 121.22(H) (Supp. 1993).

[138] See IOWA CODE ANN. § 28A.6(3)(d) (West Supp. 1993); MINN. STAT. § 471.705(2) (Supp. 1993).

[139] *Id.* at 744.

[140] *Id.*

In remanding the case, the appellate court ordered the trial court to dismiss the board members if it found three or more intentional violations.[141]

Florida's removal provision currently faces a legal challenge after the Florida Supreme Court issued an advisory opinion declaring that Gov. Lawton Chiles has no constitutional authority to remove a school board member for sunshine law violations.[142] Chiles ordered the removal of Dianne Rowden from the Hernando County School Board after she pleaded guilty to thirteen separate violations of the Florida Government-In-The-Sunshine Law. Rowden filed a lawsuit challenging the governor's authority to remove her from office, and Chiles asked the state supreme court for an advisory opinion. The court found that as a district officer, Rowden was subject to removal only by a majority vote of the state Senate.[143] A Senate subcommittee voted to reinstate Rowden despite testimony from several Hernando officials that Rowden continued to violate the sunshine law.[144] The issue will soon come before the full Senate.[145]

Critics of removal provisions argue that the public should remove violators at the polls.[146] This argument ignores the many non-elected officials subject to sunshine laws, and forces the public to wait until the end of the elected official's term of office to vote the official out. Critics also argue that removal provisions could subject a good faith violator to removal.[147] Limiting removal sanctions to repeat violators -- those who violate the sunshine law more than once during a single term of office -- would protect good faith violators from removal while punishing the deliberate, repeat violator. Removal provisions should guarantee the official the right to a jury trial and spell out the elements of the offense.[148]

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[141] *Id.* at 745.

[142] "Rowden continues fight over dismissal from board," *The Brechner Report*, January 1994, at 1 (on file with authors).

[143] *Id.*

[144] "Panel votes to reinstate Rowden," *The Brechner Report*, December 1993, at 1 (on file with authors).

[145] *Id.*

[146] *See, e.g.*, Knoth, *supra* note 110, at 514; Comment, "Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea for Realistic Remedies," 41 *La. L. Rev.* 192, 217 (1980).

Allowing discretionary removal for the second violation while making removal mandatory for the third violation ensures proper enforcement of sunshine laws. Defendants are given more than adequate notice that future violations will carry serious consequences. Removal for first-time violators ignores the educational function of the law in favor of harsh sanctions which only serve as fuel for critics of open government.

Conclusion

While many state sunshine laws contain detailed enforcement provisions, some state sunshine laws suffer from poorly drafted enforcement provisions. The lack of specific statutory language in many state sunshine laws gives the courts far too much discretion in applying enforcement provisions. Discretionary enforcement of the sunshine law reduces the deterrent effect of the laws and makes it difficult for citizens to stop illegal meetings. If the media and private citizens are not empowered by state sunshine laws to bring lawsuits to enforce their right of access to government meetings, the laws are not an effective force in ensuring open government.

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[147] See Comment, "Entering the Door Opened," *supra* note 144, at 218.

[148] See the model, Appendix 3, for such a removal provision.

State legislatures should amend their sunshine laws to make enforcement provisions mandatory for all violations of the sunshine law, removing the vague statutory language which currently encourages judicial discretion. Writs of mandamus should be issued whenever a question over any section of the sunshine law arises. Injunctive relief should be mandatory for all violations of the sunshine law, regardless of the good faith arguments of officials, if a party can show good reason for expecting that an official will violate the act.

Any deliberation or decision resulting from an illegal meetings should be invalidated by the courts. State legislatures should amend their sunshine laws to make invalidation mandatory, again removing judicial interpretations of legislative intent from the process. Any decision produced in violation of the sunshine law must be invalidated to protect the public from the consequences of illegal meetings. A brief statute of limitations would protect officials from fighting lawsuits based on meetings held in years past.

Provisions for criminal or civil penalties should also be automatic for willful and knowing violations. The courts should retain discretion as to the amount of punishment handed down, but the decision as to whether or not to assess penalties should be triggered automatically in the statute itself. Automatic civil and criminal penalties put government officials on notice and encourage local or state prosecutors to enforce the law. Officials who unsuccessfully object to closed meetings should be protected from prosecution so long as they record their objection in the minutes. The provision should also guarantee the violator the right to a jury trial. Attorneys' fees should be awarded to any plaintiff who prevails in a sunshine law action. Finally, the act should provide that a public official can be removed at the discretion of the court if the official is convicted for two separate sunshine law offenses. On the third conviction, however, removal should be mandatory.

These enforcement provisions give state sunshine laws the "teeth" needed to make government officials take the law seriously. The methods used to enforce the sunshine law must be designed primarily to ensure compliance and educate public officials rather than to punish the guilty or impede the conduct of public business. The suggested provisions seek to deter future violations by gradually increasing the penalties for repeat violators. First-time violators do not face removal from office, and only willful and knowing violators face civil or criminal penalties. Writs of mandamus, invalidations and injunctions would be the primary enforcement weaponry. These sanctions place primary emphasis on education rather than on punishment or political embarrassment.

Most importantly, however, the recommended enforcement provisions require the state legislature to specify how the sunshine law is to be enforced. No longer forced to interpret vague statutory commands, the courts will resume their rightful function as the arbiter of fact, dispensing the proper enforcement sanctions if the crime fits the defined punishment. By removing some of the judicial discretion from the process, states can ensure the public's right to attend governmental meetings.

A Model Enforcement Provision for State Sunshine Laws

The following model enforcement statute represents the arguments reviewed in the paper. Much of the model can be found in existing state statutes, but minor revisions in statutory language was required to reflect the suggestions discussed in the paper. The language, if taken directly from a state statute or other model statutes, is cited directly to that statute; uncited provisions represent legislative provisions created and proposed by the authors.

Procedure and Remedies for Enforcement

This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any political subdivision of the state in which the violation is alleged to have occurred.[149]

(A) **Standing**. A person denied access to any meeting as defined in this chapter may file a complaint in any court of competent jurisdiction seeking a writ of mandamus to compel a public body to comply with the provisions of the Model Sunshine Law and to seek other appropriate relief.[150]

(B) **Expedited procedure and ruling**. Upon the request of the complainant, the court shall:

1. order that each respondent be served in an expedited manner;

2. order a reduction in the periods of time permitted by the applicable court rules for moving or pleading in response to the complaint;

3. order a reduction in the amount of time permitted by the applicable court rules for responding to requests for discovery, provided that the court need not order the reduction of the specific amount of time requested;

4. schedule a determination of the merits of the action ahead of all other civil cases, including those filed before the filing of the Model Sunshine Law complaint, and decide the merits of the action within thirty days of the final filing by the complainant.[151]

(C) **Burden of proof and failure to raise exemption as defense**. The court shall presume that all meetings of governmental bodies meeting the definition of "meeting" under the Model Sunshine Law are subject to the provisions of the Model Sunshine Law requiring public access. The burden shall be upon the governmental official or public agency to prove by clear and convincing evidence and as a matter of law that the subject matter of the meeting falls within one of the asserted exemptions of the Model Sunshine Law. Unless the exemption prohibits public access, the failure by a public agency or governmental official to assert an exemption shall constitute a waiver by the public agency or governmental official to assert that exemption as a reason for denying public access to the meeting. Absent a compelling governmental interest specified by the court, the court shall not assert an exemption not asserted by a public agency or governmental official.

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[149] WIS. REV. STAT. § 19.97 (1993).

[150] *Id.*

[151] Bruce W. Sanford and David L. Marburger, 1993 *Open Records Model Law: revised Guidelines and Recommended Minimum Standards for Statutes Governing Public Access to Government Records and Information* 31, Society of Professional Journalists, Washington, D.C. [hereinafter cited as *SPJ Public Records Model*.

(D) **Remedies**. In addition and supplementary to any action filed by a citizen under the Model Sunshine Law, the attorney general or the district attorney of any political subdivision of the state in which the violation is alleged to have occurred shall commence an action, separately or in conjunction with the citizen or citizens' action(s) to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, civil or criminal penalties or removal from office, as directed by subsections (D)(1)-(5).

(D)(1) **Writs of mandamus**. The existence of an issue of fact shall not preclude issuance of a writ of mandamus pursuant to this section. The court shall resolve material issues of fact by conducting an immediate evidentiary hearing pursuant to applicable rules of that court and state rules of evidence and civil procedure. The court shall issue a specific finding stating its resolution of each material issue of fact. While the writ is pending, no governmental body shall meet to address the subject before the court. Such a meeting constitutes an automatic violation of the Model Sunshine Law, and all action resulting from such meeting shall be declared null and void.

(D)(2) **Declaratory Judgments**. (a) Any person affected by a decision of a governing body may petition the court for the county in which the governing body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of this chapter.[152]

(b) A public official may, with the permission of the person or group of persons seeking access to the meeting in question, petition the court for a declaratory judgment to determine the applicability of this chapter to matters or decisions of the governing body.

(D)(3) **Injunctions**. Any person may bring an action seeking a temporary or permanent injunction to prohibit a threatened or reasonable anticipated violation of this chapter.

(a) A court of proper jurisdiction shall immediately enjoin an ongoing or proposed meeting alleged to be in violation of the law. The injunction shall remain in effect until the court resolves the merits of the petition. If a bona fide legal issue exists, the court shall immediately issue a temporary injunction halting further meetings until the action is resolved.

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[152] ORE. REV. STAT. § 192.680 (1993).

(D)(4) **Invalidation of action taken in violation of statute**. Any act of a public body shall be null and void where:

(a) it resulted from a vote taken other than in compliance with the provisions of this chapter, or

(b) it resulted from discussion conducted other than in compliance with the provisions of this chapter.[153]

(D)(5) **Civil Penalties**. Any person who violates any of the foregoing sections of this chapter shall be fined $500.00 for the first offense and no less than $1,000 for any subsequent offense, in addition to criminal sanctions, recoverable by the State by a summary proceeding.

(a) A public official who is convicted of intentionally violating this chapter for a second time may be personally liable in a civil action for actual and exemplary damages of up to $1,000, plus costs and attorneys' fees to the person or group bringing the action. An action for damages under this section may be joined with an action for injunctive or declaratory relief under sections (D)(2) and (D)(3).[154]

(b) Whenever a member of a public body believes that a meeting of that body is being held in violation of the provisions of this chapter, the member shall be immune from civil liability where the official immediately states an objection for the record, stating specific reasons for the objection.

(1) Where the public body overrules the member's objection, the objecting official may continue to participate at such meeting without penalty provided he has complied with the duties imposed by this section.[155]

(D)(5) **Criminal Penalties**. (a) Any person who knowingly violates any of the foregoing sections of this chapter is guilty of a second-degree misdemeanor punishable by a fine of $500.00 and six hours of open government training for the first offense.

(b) Any person found guilty of a second criminal violation of this chapter is guilty of a first-class misdemeanor punishable by a fine of and no less than $1,000. A second criminal violation shall be grounds for discretionary removal from office under Section (D)(6).

(c) Any person found guilty of a criminal violation of this chapter shall pay the attorneys' fees and courts costs of the prevailing complainant.

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[153] Bruce W. Sanford et. al., 1993 *Open Meetings Model Law: Guidelines and Recommended Minimum Standards for Statutes Governing Public Access to Government Meetings* 15, Society of Professional Journalists, Washington, D.C. [hereinafter cited as *SPJ Public Meetings Model*.

[154] MICH. COMP. LAWS ANN. § 15.272(3) (1993).

[155] N.J. STAT. §10:4-17 (1993).

(D)(6) **Removal from Office**. (a) The courts shall have discretion to order the removal of any public official from office if that member has a prior conviction under this chapter.[156]

(b) Upon a third violation by the same person connected with the same governing body, the court shall order such official immediately removed from public office.[157] Any official removed from office under this chapter shall forfeit any further right to serve on any public body for a period of time equal to the term of office such person was then serving.

(c) Any public official who knowingly violates an injunction, writ of mandamus or declaratory judgment ordering such official to comply with the provision of this chapter shall be removed from office.[158]

(D)(7) **Attorneys' Fees and Court Costs**. Where a complainant prevails on the merits of any part of his claim under this chapter, the court shall order the payment to the complainant of reasonable attorneys' fees and court costs.[159] The costs and fees shall be paid by the members of the governmental body charged in the action.[160]

(a) If the defendant files a notice of appeal in an action under this chapter, attorneys' fees and court costs awarded to the prevailing complainant shall be placed in escrow until all appellate actions are exhausted.

(b) If the complainant prevails at the appellate level, the defendant shall pay all attorneys' fees and court costs for the appellate action(s).

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[156] IOWA CODE § 21.6-3(d) (1993).

[157] MINN. STAT. § 471.705 (1993).

[158] OHIO REV. CODE ANN. § 121.22(H) (Baldwin 1993).

[159] SPJ Public Meetings Model Law at 16.

[160] IOWA CODE § 21.6-3(b) (1993).

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Sexual Harassment and Vicarious Liability of Media Organizations

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Sexual Harassment and Vicarious Liability of Media Organizations

I. Introduction

Although Anita Hill's testimony in Clarence Thomas's Senate confirmation hearing first brought the issue to the attention of many, sexual harassment in the workplace is a long-standing problem of enormous dimensions. The Thomas allegations, the Tailhook scandal, and charges against Senator Bob Packwood are only the most prominent examples of a pervasive condition in many workplaces. According to a 1992 *Washington Post*-ABC national survey, 32 percent of women interviewed said they had been harassed on the job. The poll also found that 85 percent of men and women said sexual harassment was a problem in the workplace.[1]

For media organizations, the problem has not been one simply of reporting harassment that takes place in other organizations. Media organizations themselves frequently have been the site of sexual harassment allegations. For example, a survey by the Associated Press Managing Editors Association found that nearly 40 percent of women working at 19 newspapers in the United States said they had been sexually harassed.[2] The problem also exists in the electronic media[3] and in the public relations and advertising fields.[4]

Obviously, media organizations need to take steps to reduce or eliminate sexual harassment. But companies cannot control their employees in all circumstances. As a result, one problem for executives in media organizations is protecting their companies (as opposed to harassers) from liability for sexual harassment. Under the legal doctrine of vicarious liability, a company may be liable for the actions of its employees to the extent the employer knows or should have known about the conduct. In the sexual harassment context, the threat of vicarious liability makes it incumbent upon the organization to take a number of steps to make it clear to all employees that harassment will not be tolerated and to provide a mechanism for prompt action if harassment does take place. Interestingly, the steps that organizations should take to protect against vicarious liability are also steps that many would argue are the ethically proper way to deal with sexual harassment in the workplace.

This paper will explore the legal issue of the vicarious liability of media organizations for sexual harassment by their employees. The paper will examine two distinct types of sexual harassment and the legal requirements for each. The paper will then describe the legal standards for holding organizations liable for harassment committed by employees. Next, the paper will examine media-specific cases in which allegations of sexual harassment have been made. Finally, the paper will offer concluding perspectives on how media organizations can best deal with both the legal and ethical obligation to prevent sexual harassment.

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[1] Richard Morin, Harassment Consensus Grows; Poll Finds Greater Awareness of Misconduct, The Washington Post, 18 December 1992, at A1.

[2] Carolyn Weaver, A Secret No More, Washington Journalism Review, September 1992, at 24.

[3] Kate Maddox, Sex Harassment in the Media, Electronic Media, 9 December 1991 at 1; Anne P. Pomerantz, No Film at 11: The Inadequacy of Legal Protection and Relief for Sexually Harassed Broadcast Journalists, 8 Cardozo Arts & Ent. L.J. 137 (1989).

[4] Susan Fry Bovet, Sexual Harassment; What's Happening and How to Deal With It, Public Relations Journal, November 1993, at 26.

II. Sexual Harassment Defined

The federal statutory remedy for sexual harassment derives from Title VII of the Civil Rights Act of 1964. That statute states that it is "an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensations, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[5] Although the statute does not delineate liability for sexual harassment with any specificity, numerous courts have filled in that gap over the years.

There are two distinct types of harassment. One is the situation in which raises, promotions, or other job benefits are conditioned upon agreement to sexual demands. This category is often referred to as "quid pro quo" harassment (literally, "something for something") or "tangible job benefit" harassment. Quid pro quo harassment also would include discharge, refusal to hire, or assignment of unpleasant tasks resulting from rejection of sexual demands.

To establish a prima facie case of quid pro quo harassment, a plaintiff must prove that he or she was subjected to unwelcome sexual harassment based on sex and that "the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment."[6] The employee also must demonstrate that the job benefit or detriment was conditioned upon the acceptance or rejection of the harassment and that the employee was qualified to have received any benefit denied because of his or her rejection of the illegal conduct.

The second category of sexual harassment is so-called "hostile environment" harassment, which includes situations in which there is no direct economic or job status inducement or threat by the harasser. Rather, hostile environment harassment arises from a pattern of conduct in the workplace that might include unwelcome sexual advances, sexual innuendoes, and other sexual conduct that interferes with the victim's ability to perform on the job. The Equal Employment Opportunity Commission defines hostile environment harassment as sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[7]

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[5] 42 U.S.C. 2000e-2(a)(1).

[6] Spenser v. General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990).

In 1993, the U.S. Supreme Court held that the standard for establishing a hostile environment claim did not require that plaintiffs demonstrate psychological damage in order to recover. In *Harris v. Forklift Systems*,[8] Teresa Harris, an equipment rental manager, alleged that the president of Forklift Systems subjected her to harassing comments throughout her tenure with the company. Harris claimed -- and the trial court agreed -- that Charles Hardy, the president, insulted Harris in front of other employees with such remarks as "You're a woman, what do you know," and by referring to her as "a dumb ass woman."[9] Moreover, Hardy directed a number of sexual innuendoes at Harris and other female employees, commenting on their clothing and asking them to get coins from his pants pocket. Hardy also suggested that he and Harris go to a motel to discuss her request for a raise.

The trial court found that the comments were offensive to a "reasonable woman," but were not serious enough to affect Harris' psychological well-being or interfere with her job performance. As a result, Harris could not establish a viable claim for sexual harassment. The United States Court of Appeal for the Sixth Circuit agreed.

The U.S. Supreme Court rejected the psychological harm standard, holding instead that "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive. . . there is no need for it also to be psychologically injurious."[10] The Court emphasized that federal sexual harassment law "comes into play before the harassing conduct leads to a nervous breakdown."[11] The Court declined to set forth a precise test for when conduct creates a hostile environment. Rather, the Court wrote that the determination could only be made by considering all the circumstances of a given case, including the frequency of the offensive conduct, its severity, and the extent to which it interfered with the plaintiff's job performance. The Supreme Court remanded the *Forklift* case for further proceedings in accordance with the Court's opinion.

Although the *Forklift* case does not set forth a "bright line" rule, it does suggest that the conduct necessary to create a hostile environment need not be as severe as some courts and lawyers had thought. By emphasizing that no "nervous breakdown" was necessary for a hostile environment to exist, the Court opened the door for plaintiffs to get their cases before a jury if a factual dispute existed as to the severity of the harassment. As one plaintiff's lawyer said of the *Forklift* decision: "This decision will certainly increase the number of cases that can get to a jury, and where a judge will say, 'I can't decide whether these facts are oppressive enough.'"[12]

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[7] 29 CFR 1604.11(a)(3) (1992).
[8] 114 S.Ct. 367 (1993).
[9] 114 S.Ct. at 369.
[10] 114 S.Ct. at 371.
[11] 114 S.Ct. at 370.

III. Vicarious Liability

The common-law doctrine of vicarious liability is very old.[13] The doctrine, also called *respondeat superior* ("let the master answer"), holds that wrongs committed by a "servant" are imputed to the "master." In the modern corporate context, vicarious liability means that under certain circumstances torts committed by employees are chargeable to the organization. A variety of justifications for the doctrine have been advanced, but the principal reason seems to be a matter of who should bear the risk of wrongs committed by (often judgment-proof) employees. As noted commentator Professor William Prosser explained the doctrine: "What has emerged as a modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business."[14] Although vicarious liability originated in the common law, it has been extended to various areas of statutory law, including Title VII sexual harassment suits.

The general rule that has emerged from federal appellate courts is that companies are strictly liable for quid pro quo harassment by supervisory employees. Under strict liability, there is no need for a plaintiff to show that the company had notice of the harassment or did not try to prevent it. The mere fact that it took place is enough to assign liability to the company for the acts of its supervisory employee. For example, the U.S. Court of Appeals for the Sixth Circuit found strict liability applicable in a 1992 case involving harassment by a supervisor. In *Kauffman v. Allied Signal,*[15] the plaintiff's male supervisor assigned her onerous tasks when she rebuffed his suggestions that she show him the results of her breast enhancement surgery. The Sixth Circuit stated that "under a 'quid pro quo' theory of sexual harassment, an employer is held strictly liable for the conduct of its supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of respondeat superior."[16] Other federal courts of appeal have followed similar reasoning.[17] One treatise on the subject explained that strict liability applies in quid pro quo cases because "the supervisor acts for the company by definition, and the employer's knowledge of harassment is imputed to it through its agent, the supervisor. The employer is also strictly liable for supervisory job benefit harassment that partially takes place after hours or off company property, if the employer had relinquished broad personnel authority over the victim to the supervisor."[18]

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[12] Jan Hoffman, Plaintiffs' Lawyers Applaud Decision, New York Times, 10 November 1993, A14, col. 1.

[13] "The idea of vicarious liability was common enough in primitive law. Not only the torts of servants and slaves, or even wives, but those of inanimate objects, were charged against their owner." William L. Prosser, Law of Torts 458 (4th ed. 1971).

[14] Prosser, Law of Torts at 459.

[15] 970 F.2d 178 (6th Cir. 1992).

Strict liability only applies in quid pro quo cases, however. The U.S. Supreme Court decided in 1986 that employers would not be strictly liable for hostile environment harassment by their employees in *Meritor Savings Bank v. Vinson.*[19] In the *Meritor* case, Vinson, a female bank employee, alleged that the bank's male vice president had harassed her constantly throughout her four-year employment at the bank. The case was based solely on a "hostile environment" because both parties admitted that Vinson's advancement from teller-trainee to assistant branch manager was based on merit alone. Vinson claimed that the vice president had initiated a sexual relationship, in which she had agreed to participate for fear of losing her job. The vice president "thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times."[20] Moreover, Vinson alleged that the vice president "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[21]

The Supreme Court recognized the legal validity of claims of "hostile environment" harassment and proceeded to discuss the issue of when an employer could be held liable for the acts of its employee. The Court declined to issue a definitive rule on employer liability, but did state that a lower court had erred in concluding that employers were strictly liable for harassment by their employees -- in this case, the vice president. The Court also rejected an argument by the bank that because it had a grievance procedure that Vinson did not utilize, it should be shielded from liability because it could not have known about the harassment and taken corrective action. Instead, the Court reasoned that "Congress wanted courts to look to agency principles for guidance in this area."[22] This finding suggested that rather than creating a special rule for hostile environment harassment, courts should look to general common-law principles for determining when vicarious liability applied. The particulars of how common-law doctrine should be applied in Title VII litigation are still being worked out in lower courts.

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[16] 970 F.2d at 185-186.
[17] E.g., Chamberlin v. 101 Realty, Inc., 915 F.2d 178 (1st Cir. 1990); Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989).
[18] Employment Coordinator at 82,218 (1993).
[19] 477 U.S. 57 (1986).
[20] 477 U.S. at 60.
[21] 477 U.S. at 60.
[22] 477 U.S. at 72.

The *Meritor* majority also pointed out two flaws in the bank's grievance procedure and nondiscrimination policy. First, the bank's nondiscrimination policy did not specifically address sexual harassment. Second, the grievance procedure required an employee to complain first to his or her supervisor. In this case, the supervisor was also the harasser. The Court suggested that the policy should have provided some alternative means of reporting the harassment.

Concurring in the judgment, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, called for something closer to strict liability for an employer when a supervisor created a hostile environment. Justice Marshall's opinion recognized that some limitations on strict liability might be appropriate, but stated he would "hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."[23]

Since *Meritor*, lower federal courts have applied a variety of standards for determining when a company should be vicariously liable for the creation of a hostile environment by one of its supervisors. It appears that most courts have adopted a standard holding a company liable when it knew of the harassment or should have known of it and did not take some immediate action to remedy the situation. For example, the Eleventh Circuit endorsed such a standard in 1989 in *Steele v. Offshore Shipbuilding* when it found that "liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor."[24] In *Steele*, the plaintiff was a secretary at a shipbuilding firm whose vice president, Anthony Bucknole, frequently engaged in off-color and suggestive "joking" with female employees. "For example, Bucknole requested sexual favors from [female employees]. He commented on their attire in a suggestive manner and asked them to visit him on the couch in his office."[25] After the employees complained, the company reprimanded Bucknole and the harassment stopped.

The federal district court that initially heard the case found Bucknole had created a hostile environment and ordered him to pay nominal damages as well as attorneys' fees. However, the court found the company not liable for Bucknole's actions. The Eleventh Circuit agreed. The court of appeals stated that because the employer learned of the harassment and took prompt action (that included calling Bucknole back from Saudi Arabia to New York for a reprimand), it was not liable for his actions. "Of special importance," the Eleventh Circuit wrote, "Bucknole's harassment ended after the remedial action. The corporate employer, therefore, is not liable for Bucknole's actions under the doctrine of respondeat superior."[26]

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[23] 477 U.S. at 78 (Marshall, J., concurring in the judgment).
[24] 867 F.2d 1311, 1316 (11th Cir. 1989).
[25] 867 F.2d at 1313.

Other federal courts of appeal have created similar standards.[27] Most do not require that the corporate employer have actual notice of the harassment; it is enough that the employer *should* have known of the conduct by exercising reasonable care. The Tenth Circuit, for example, invoked section 219 of the Restatement (Second) of Agency for guidance on the question of corporate vicarious liability.[28] That section creates employer liability when "(1) the master was negligent or reckless, and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[29] This formulation would allow employer liability in cases in which the employer was negligent for not being aware of the hostile environment. A negligence standard introduces all the legal uncertainties associated with a jury determination of what a "reasonable person" or "reasonable employer" would have known or done in a similar situation.[30]

Regardless of the precise legal formulation, the general rule seems to be that companies should make every effort to monitor the workplace to ensure that a supervisor is not creating a hostile environment for employees. If such a situation develops, the company must quickly take action to remedy the harassment.

As the discussion above demonstrates, companies can be held vicariously liable for hostile environment sexual harassment by a supervisor. Not so obviously, they also can be held vicariously liable for a hostile environment created by co-workers. Co-workers, of course, could not commit quid pro quo harassment because they lack the power of hiring, firing, and otherwise affecting job benefits. Co-workers can, however, create a hostile environment.

EEOC Guidelines state that vicarious liability for co-worker harassment depends, as in supervisory hostile environment harassment, on the knowledge of the employer: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[31] The few federal appellate courts that have considered the matter seem to have adopted this standard.

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[26] 867 F.2d at 1316.

[27] For a thorough review of standards created by federal appellate courts after *Meritor*, see Hope A. Comisky, 'Prompt and Effective Remedial Action?' What Must an Employer Do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment?, 8 The Labor Lawyer 181, 182-84 (1992).

[28] Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

[29] 833 F.2d at 1418, quoting Restatement (Second) of Agency 219 (2) (1958).

[30] Negligence is "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do." Black's Law Dictionary 930 (West 5th ed. 1979).

For example, in *Hall v. Gus Construction Co.*,[32] the Eighth Circuit in 1988 held that either actual or imputed knowledge of harassment by co-workers was sufficient to create employer liability. In *Hall*, women employees hired to work as traffic controllers at construction sites were subjected to vicious harassment by male members of the construction crew. The harassment included the male crew members verbally abusing and physically touching the women employees, as well as "mooning" and exposing themselves to the women. The male crew members also "would refuse to give the women a truck to take to town for bathroom breaks. When the women would relieve themselves in the ditch, male crew members observed them through surveying equipment."[33]

The construction company argued that the male crew members were not its agents for purposes of vicarious liability and that they acted outside the scope of their employment. The Eighth Circuit disagreed. The *Hall* court cited cases involving racial harassment by co-workers in which employers were held liable if they had reason to know of a pattern of harassing conduct and did not prevent it. In *Hall*, a supervisor, Mundorf, was aware of some of the incidents and should have been aware of the poisoned atmosphere of the workplace, the court reasoned. The court stated as follows: "[Mundorf] knew that the men bombarded the women with sexual insults and abusive treatment. Even if Mundorf did not know everything that went on, the incidents of harassment here... were so numerous that Mundorf and Gus Construction Co. are liable for failing to discover what was going on and to take remedial steps to put an end to it."[34]

Conduct by non-employees also may result in vicarious liability for an employer if the employer knows or should have known of the harassment and takes no action. For example, a restaurant was found liable in a case in which a waitress was harassed by regular customers and the employer did nothing to prevent the harassment.[35] In another non-employee case, an employer was held liable for harassment of a female lobby attendant by the general public after it required her to wear a sexually revealing uniform.[36] The attendant was subjected to a variety of lewd comments and propositions. The employer had notice of the harassment but nonetheless required the attendant to wear the outfit. In the media context, it is possible to envision harassment by such non-employees as frequent journalistic sources -- for example, government officials[37] -- or by advertisers buying space or time from print or electronic media, or by clients of advertising or public relations firms.

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[31] 29 CFR 1604.11 (d) (1992).
[32] 842 F.2d 1010 (8th Cir. 1998). See also, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).
[33] 842 F.2d at 1012.
[34] 842 F.2d at 1016.
[35] EEOC Decision 84-3 (1984).
[36] EEOC v. Sage Realty, 507 F.Supp. 599 (S.D.N.Y. 1981).

Thus, supervisor, co-worker, and non-employee hostile environment cases can give rise to employer vicarious liability when the employer knew or should have known of the harassing conduct and refused to take action. These cases suggest that an employer may not simply look the other way and then claim that it was not aware of a hostile climate in the workplace.

IV. Sexual Harassment in Media Organizations

Although no reported trial or appellate cases have yet dealt squarely with the vicarious liability of a media organization, the problem of sexual harassment is no stranger to the media. A number of (unsuccessful) cases have been reported, while other media cases have resulted in settlements prior to trial and thus are not found in reported decisions.

One of the reported cases which found no harassment was the 1991 decision in *Schneider v. NBC New Bureaus,*[38] in which an NBC sound technician alleged that she resigned because of a hostile workplace environment. The plaintiff, Deborah J. Schneider, claimed that poor assignments and a generally hostile atmosphere based on her sex led to her resignation. The U.S. District Court for the Southern District of Florida found that Schneider's failure to receive some assignments was primarily due to her poor attitude and job skills. The district court also found that Schneider "failed to show the creation or maintenance of a sexually hostile working condition."[39] The plaintiff had complained of, among other things, sleeping arrangements on various assignments, suggestive posters and videotapes in the workplace, and at least one incident in which the plaintiff was propositioned by a fellow employee. The court placed considerable reliance on the plaintiff's failure to complain contemporaneously with these events. Because the court found the plaintiff had not made a sufficient showing of a hostile environment, the court did not consider the issue of vicarious liability.

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[37] See also, e.g., Carol D. Rasnic, Illegal Use of Hands in the Locker Room: Charges of Sexual Harassment and Inequality from Females in the Sports Media, 8 Ent. & Sports Law. 3 (1991).
[38] 801 F.Supp. 621 (S.D. Fla. 1991).
[39] 801 F. Supp. at 633.

Another media case in which a district court refused to find sexual harassment was the 1988 decision in *Silverstein v. Metroplex Communication.*[40] The court also expressly addressed the vicarious liability issue and found the corporation blameless. Linda Silverstein, a sales manager for a top-40 FM radio station, claimed that co-workers and supervisors created a hostile environment from which she eventually was fired.

The U.S. District Court for the Southern District of Florida rejected the claim, as well as related claims of discrimination. The court noted that the plaintiff did not achieve the sales goals set forth by the station, while the plaintiff's predecessor in the position had always exceeded the sales goals. The court also noted that the plaintiff had trouble getting along with the station's national sales representative firm, an organization that sold advertising for the station to national advertisers. The plaintiff was inaccessible to the national sales firm, did not return telephone calls, and damaged the station's relationship with the firm, the court found.

Silverstein claimed that Matthew Mills, general manager of the station, joked about a vibrator in Silverstein's presence. The court expressed doubt about whether that event occurred. The court also regarded as insignificant claims that Mills asked about "the well-being of Plaintiff's boyfriend," or that "on one occasion, while on a business trip, he may have asked Plaintiff to hold for him his newspaper or wallet."[41] Silverstein also claimed that several salespeople made sexual remarks to her, including one salesperson who telephoned her and tried to persuade her to spend the night with him. The court regarded as significant Silverstein's failure to complain about the alleged harassment. The court also stated that it was not convinced all the conversations Silverstein alleged took place.

On the issue of the vicarious liability of Metroplex, the corporate owner of the station, the court said Silverstein failed to complain to Metroplex representatives, who "were available to hear Plaintiff's grievances. Also, the harassment was not so pervasive as to put Metroplex on constructive notice of the conduct."[42] The court thus concluded that the corporation was not responsible for any harassing conduct that did take place.

Although information about unreported media harassment cases is difficult to come by, some reports of the problem have suggested that a significant number of media cases are settled prior to trial, often with agreements forbidding the parties to discuss the case publicly. For example, writer Carolyn Weaver reported that "interviews with nearly 100 reporters, editors, and producers at more than 30 newspapers, magazines and broadcast outlets reveal a largely untold story of sexual harassment within the media." In "A Secret No More," a study of sexual harassment that appeared in *Washington Journalism Review*, Weaver wrote that media harassment is "a story -- oddly enough in an industry dedicated to uncovering the facts -- of a lot of little coverups."[43]

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[40] 678 F.Supp. 863 (S.D. Fla. 1988).
[41] 678 F.Supp. at 867.
[42] 678 F.Supp. at 870.

Weaver's research found that of eight harassment suits either filed or threatened against media organizations between 1985 and 1992, six were settled with a provision that the settlement remain confidential. For example, Weaver reported that a 1986 lawsuit by seven women at CBS working on the overnight news program "Nightwatch" resulted in a confidential settlement. According to Weaver, the women "had been sexually harassed and sexually assaulted, despite repeated requests for help from top managers."[44] If this version is correct, there would seem to be little question that the case would have involved a strong likelihood of vicarious liability had it gone to trial.

Weaver also described a confidential settlement by a deputy national editor at the *Kansas City Star* in a case that reportedly involved sexually derogatory language and inappropriate touching by other employees. The *Star*, responding to Weaver's report, said that its own investigation revealed that no harassment occurred and that the paper settled to resolve the matter. Numerous other allegations of sexual harassment in media organizations have been reported.[45]

Anne P. Pomerantz reported other media harassment cases that never reached trial in a 1989 article in the *Cardozo Arts & Entertainment Law Journal*.[46] For example, Pomerantz reported the case of Elissa Dorfsman, a sales manager for CBS, who sued CBS and a top sales executive after alleging harassing conduct at a company sales dinner. According to Pomerantz, CBS privately reprimanded the executive but took no other action. Eventually, Dorfsman settled the case "for a purported $250,000."[47]

Another settlement came in a case involving an employee who worked for Playboy's cable channel.[48] Stephanie Wells, director of the channel's On Air Promotions department, brought suit after "paint[ing] a picture of a company that scorned repeated complaints over a four-year period by Wells and several other women who were often reduced to tears by harassment by a male executive."[49] Playboy had argued, among other things, that sexually suggestive comments and other conduct could not have offended Wells because she produced adult programming as part of her job. The amount of the settlement was not disclosed.

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[43] Carolyn Weaver, A Secret No More, Washington Journalism Review, September 1992, at 24.
[44] Weaver, A Secret at 25. See also Anne P. Pomerantz, No Film at 11: The Inadequacy of Legal Protection and Relief for Sexually Harassed Broadcast Journalists, 8 Cardozo Arts & Ent. L.J. 137, 156 (1989).
[45] *See, e.g.*, M.L. Stein, Sexual Harassment Flap in Denver, Editor & Publisher, 28 March 1992, at 12; Sexual Harassment Allegation at Student Newspaper, Editor & Publisher, 30 January 1993, at 20; Susan Fry Bovet, Sexual harassment; What's Happening and How to Deal With It, Public Relations Journal, November 1993, at 26; Katie Maddox, Sex Harassment in the Media, Electronic Media, 9 December 1991, at 1.
[46] Anne P. Pomerantz, No Film at 11: The Inadequacy of Legal Protection and Relief for Sexually Harassed Broadcast Journalists, 8 Cardozo Arts & Ent. L. J. 137, 153-156 (1989).
[47] Id. at 155.
[48] Susan Seager, Playboy Settles Suit by Former Producer, Los Angeles Daily Journal, 10 Nov. 1992 at 3.

Clearly, the evidence of widespread harassment in media organizations is anecdotal at best. Nonetheless, it strains credulity to suggest that harassment is not a problem for the media, as it appears to be for nearly all businesses. Media organizations must respond seriously and in a legally appropriate manner to the problem. The next section will describe some appropriate legal responses, which also happen to be sound methods of making employees feel safer in the workplace and discouraging discrimination in general.

V. Combating Vicarious Liability

Media organizations, like other employers, should rightfully be concerned about the possibility of vicarious liability for sexual harassment. The EEOC suggests that "prevention is the best tool for the elimination of sexual harassment."[50] The agency's guidelines state that employers "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."[51]

Companies may take a number of steps to minimize the possibility of sexual harassment and thus minimize the likelihood they will be held vicariously liable for hostile environment sexual harassment. As noted above, employers are strictly liable for quid pro quo harassment, so preventative measures cannot operate to limit vicarious liability after the fact, although they can serve as a deterrent to would-be harassers. Most commentators suggest detailed sexual harassment policies that outline forbidden conduct and warn of sanctions if harassment occurs. For example, one treatise advocates the following steps: (1) issuing a policy statement that defines sexual harassment and makes it clear that harassment will not be tolerated and will result in appropriate sanctions; (2) defining sexual harassment to include both physical and verbal conduct that results either in quid pro quo or hostile environment harassment; (3) adopting a complaint procedure that assigns a specific employee to hear complaints; (4)

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[49] Id.
[50] 29 CFR 1604.11 (f) (1992).
[51] 29 CFR 1604.11 (f) (1992).

educating supervisors as to the law and company policy; (5) investigating complaints; and (6) taking appropriate action after the investigation.[52]

The issues of the policy and the complaint procedure themselves may be problematic, as demonstrated by the Supreme Court's decision in *Meritor*, the case involving the female bank employee and her supervisor. First, the Court rejected the bank's claim that "the mere existence of a grievance procedure and policy against discrimination, coupled with [the harassed employee's] failure to invoke that procedure, must insulate [the bank] from liability."[53] A grievance procedure and policy could be relevant to the determination of vicarious liability, but their existence was not sufficient by itself to allow an employer to avoid liability, the Court reasoned. Second, the bank's policy in *Meritor* addressed discrimination in general, but not sexual discrimination in particular, an omission the Court pointedly noted. Third, and perhaps most importantly, the Court stated that the bank's grievance procedure required a harassed employee to complain first to his or her supervisor -- in *Meritor*, the harasser. The Court noted that the bank's contention that the employee's failure to complain "should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[54]

The exact nature of appropriate action after the complaint has been made and found legitimate is still being determined by the courts.[55] For example, in *Ellison v. Brady*,[56] a 1991 Ninth Circuit case, the court of appeals suggested an employer's remedy could be inadequate it if allowed a harasser to return to the same workplace as the victim, even after a separation. In *Ellison*, an IRS employee was harassed by notes and letters from a co-worker who seemed obsessed with her. After a six-month cooling-off period, the co-worker was allowed to return to the office. "We believe that in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment,"[57] the Ninth Circuit wrote. The court also questioned the IRS's action of allowing the harassed employee to transfer to a less desirable location to avoid the harasser. "We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser," the court wrote.[58]

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[52] Employment Coordinator at 141,101-141,102 (1991).

[53] 477 U.S. at 72.

[54] 477 U.S. at 73.

[55] For a thorough examination of this issue, see Hope A. Comisky, "Prompt and Effective Remedial Action?' What Must an Employer do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment?, 8 The Labor Lawyer 181 (1992).

[56] 924 F.2d 872 (9th Cir. 1991).

[57] 924 F.2d at 883.

[58] 924 F.2d at 882.

In order to avoid vicarious liability for hostile environment harassment, a company must do all it can to discourage harassment, to assure rapid and effective procedures when it is alleged to have occurred, and to mete out appropriate sanctions when proven. As noted earlier, these policies not only make sense from a legal perspective, but also further socially responsible goals of eliminating all forms of discrimination from the workplace.

VI. Conclusion

Although awareness of sexual harassment seems to be growing as a result of notorious cases, the problem appears to be a pervasive one. Despite the lessons of Tailhook, Senator Packwood, and the Thomas nomination, sexual harassment is alive and well. The stubborn nature of the problem suggests that media organizations should be aware of and respond appropriately to harassment, both for selfish reasons and more noble ones.

Media organizations, like other employers, are subject to strict liability for quid pro quo harassment by supervisors. In cases of hostile environment harassment, whether the harassment originates from supervisors, co-workers, or non-employees, media organizations can be held vicariously liable if they know or should have known of the harassment and do not take immediate and effective steps to remedy it. Clearly, media companies need strong policies and, perhaps more importantly, a genuine and clearly communicated unwillingness to tolerate any form of harassment in the workplace. Such a commitment not only helps to protect the company from legal liability, it also should result in a workplace that is more humane and more productive.

Abstract

Sexual Harassment and Vicarious Liability of Media Organizations

Matthew D. Bunker, Department of Journalism, University of Alabama

A paper presented to the Commission on the Status of Women at the
AEJMC 1994 annual convention, Atlanta, Georgia

Sexual harassment is a serious problem in U.S. workplaces, including those of media organizations. National reaction to the Tailhook scandal, the Clarence Thomas confirmation proceedings, and the allegations involving Senator Packwood all suggest that the problem is both widespread and seemingly intractable. This paper examines under what conditions businesses can be held responsible -- vicariously liable -- for monetary damages for sexual harassment committed against their employees. The paper explores the different types of sexual harassment as defined by law and examines legal cases in which vicarious liability standards have been adjudicated. In addition, the paper examines the largely unreported problem of sexual harassment in media organizations. The paper also explores possible steps media organizations can take to reduce the likelihood of vicarious liability.

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SOLID-GOLD PHOTOCOPIES: A REVIEW OF FEES FOR COPIES OF PUBLIC RECORDS ESTABLISHED UNDER STATE OPEN RECORDS LAWS

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An Abstract

By John R. Bender, Ph.D.
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Most discussions state open records laws simply observe that fees for copies of public records are supposed to be reasonable or limited to the acutal costs. Nevertheless, public agencies often impose high fees. A review of the laws of all 50 states and the District of Columbia reveals a number of statutory provisions that allow records custodians to set high fees or otherwise raise the price for access to public information.

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Most discussions state open records laws observe simply that fees for copies of public records are supposed to be reasonable or limited to the acutal costs. Nevertheless, recent incidents show that high fees for copies of public records are a continuing problem. The fees are the result of the vagueness of the "reasonableness" and "actual cost" standards, The vagueness allows custodians to inflate per-copy charges with costs that should be attributed to the request as a whole. Also, the laws often expand the factors that can be considered in charging for copies. Beyond the cost of reproduction, such things as labor, search, segregation of exempt materials, use of facilities, and supervision can be added to the fees for copies. Fees for computer records are increased by additional charges for a variety of reasons, including the commercial value of the information. The policy of some states of allowing public agencies to decide the format in which information will be released also makes computer data more expensive. Custodians in some states raise the price of public information in indirect ways as well, by refusing to mail copies of records or provide copies on request and imposing fees for inspecting public records.

SOLID-GOLD PHOTOCOPIES: A REVIEW OF FEES FOR COPIES OF PUBLIC RECORDS ESTABLISHED UNDER STATE OPEN RECORDS LAWS

A 1993 survey by the Society of Professional Journalists found excessive fees for copies of public records to be a major obstacle to access to information.[1] The St. Louis Post-Dispatch filed a lawsuit against the city of St. Louis in August 1993 claiming that a proposed fee of $2,500 for extracting records from computer files was excessive.[2] The Oakland Tribune and the First Amendment Project reviewed compliance with the California Public Records Act and found 10 state agencies were charging more for copies than media lawyers thought reasonable.[3] The Kentucky attorney general issued two opinions in January 1993 declaring photocopying fees of $1 per page excessive absent any proof that the fee reflects the actual cost of copying.[4] A Boston news organization was told that it would have to pay a rate of $600 per minute of CPU time to obtain copies of computerized information.[5] And the Arlington Courier in Virginia was told that while photocopies of documents would cost only 7 cents, the newspaper would have to pay labor charges -- $12 an hour for clerical assistance, $25 an hour for executive review, $8 an hour for photocopier operator, and $7 an hour for records center staff -- to handle a request that was expected to require 80 hours.[6] These are just a few recent instances that indicate a continuing problem with the way state and local governmental agencies set fees for copies of or access to information.

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[1] Dreyfuss, Survey Finds Rampant Violations, Sunshine Report, May 15, 1993.

[2] St. Louis Post-Dispatch, Aug. 31, 1993, at 2B.

[3] Sunshine Report, July 15, 1993, at 1.

[4] Access Reports, March 3, 1993, at 11.

[5] Braden, The high cost of data, The IRE Journal, July-August 1991, at 10, 11.

In spite of the constant stream of incidents involving excessive fees, the issue has received relatively little attention in the literature on state open records laws. Discussions of state laws usually treat fees as just one issue in a broader examination of public access issues. Burt A. Braverman and Wesley R. Heppler reviewed the open records laws of all 50 states in 1981.[7] Their article devoted one paragraph to fees for searches and copies, noting that most states limit fees to the actual or reasonable costs.[8] A 1977 article on the North Carolina public records law noted that most states have found the right to inspect records has included the right to copy.[9] Copying originally meant no more than hand-copying, but modern cases have recognized the right to photocopy records or obtain copies of computer or other magnetic tapes.[10] Some nineteenth century cases upheld fees for the inspection of documents, but the practice in the twentieth century has been to prohibit fees where the records custodian does no more than find the record.[11] Fees are permitted where the custodian provides copies, and in North Carolina, such fees must bear a reasonable relation to the cost of providing the copies.[12] John J. Watkins found that although the Arkansas law does not have a provision on fees, the attorney general has concluded that such fees should be reasonable.[13] He also found that the charges state agencies imposed ranged from 50 cents to $3 per page, suggesting that what is "reasonable" may vary widely.[14]

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[6] Bender, Excuses, Excuses, The IRE Journal, Fall 1989, at 14, 15.

[7] A Practical Review of State Open Records Laws, 49 Geo.Wash.L.Rev. 720 (1981).

[8] Id. at 750.

[9] Comment, Administrative Law – Public Access to Government-Held Records: A Neglected Right in North Carolina, 55 N.C.L.Rev. 1187, 1205 (1977).

[10] Id.

This paper attempts to fill a gap in the literature by providing a national review of a problem that seems intensely local. Disputes over access to specific records or fees for copies usually attract only local interest, and they are resolved under the laws of the particular state. Nevertheless, the problem appears in virtually all jurisdictions. Based on a review of the statutes of all 50 states and the District of Columbia, case law, and opinions of attorneys general,[15] this paper examines various issues relating to the right to receive copies of public records, how fees for copies are calculated, when fees may be reduced or waived, and other factors that may limit or enhance the ability of records custodians to charge for access to public information. The review is limited to the fee provisions of the open records laws. Laws that set specific fees for copies of specific records[16] and laws other than a state's open records law that limit copy charges[17] are outside the scope of this study. The cases reviewed for this article have been decided mostly since the mid-1960s. Because many states passed or revised their open records laws after passage of the federal Freedom of Information Act in 1966,[18] earlier cases would contribute little to understanding current practice. Also, the major focus of the paper is on fees for paper copies. Because statutory guidance on fees for computer records is sparse, provisions written to govern fees for paper records control fees for electronic ones as well. The paper does address fee issues that relate specifically to computer data.[19]

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[11] Id. at 1206.

[12] Id. at 1206-1207.

[13] Access to Public Records Under the Arkansas Freedom of Information Act, 37 Ark.L.Rev. 741, 830 (1984).

[14] Id. at note 395. For similar treatments of specific state laws, see e.g. Ziegler, The Kentucky Open Records Act: A Preliminary Analysis, 7 N.Ky.L.Rev. 7, 29-30 (1980) and Recent Developments – Government Law – Government Records Access Management Act, 1992 Utah L.Rev. 375, 382 (1992).

[15] Most states do not consider opinions of attorneys general binding. The opinions provide guidance, however, in those that have produced few or no court decisions interpreting the fee provisions of their open records statutes.

I. Right to Receive Copies

To ask whether the fees charged for copies of public records are excessive assumes that the person requesting the information has a right to receive copies. Most statutes allow persons to inspect and make copies or abstracts of public records, usually meaning hand copying. Whether a citizen has a right to receive copies made by the public agency is not always clear.

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[16] See e.g. Conn. Gen. Stat. Ann. § 14-50(a)(6) and (7) (West 1993 Supp.) setting the fee for a plain copy of an accident report at $10.75 and for a certified copy at $14.

[17] See e.g. Neb. Rev. Stat. § 29-3524 (Security, Privacy, and Dissemination of Criminal History Information Act), "Criminal justice agencies may assess reasonable fees, not to exceed actual costs, for search, retrieval, and copying of criminal justice records and may waive fees at their discretion." The Nebraska Open Records Law contains no provision on fees for copies.
Id. at § 84-712.

[18] 80 Stat. 383, 5 U.S.C. § 552. D. Teeter and D. LeDuc, Law of Mass Communications 627 (7th ed. 1992).

[19] For a specific discussion of access to computerized records, see Davidson Scott, Statutory language needed, Editor & Publisher, Nov. 2, 1991, at 9pc to 10 pc.

A number of state laws clearly give persons seeking government information the right to receive copies. Mississippi says, "[A]ny person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record...."[20] A number of states seem to follow Mississippi's approach.[21] Three states clearly apply the right to receive copies only to certified copies.[22]

A few states seem to deny any right to receive copies. Vermont law, for example, says that if a public agency uses a photocopying machine to provide copies of records, it may charge the requester for the cost of making the reproduction. But an agency is under no obligation to provide or arrange for photocopying service or allow a person to bring his or her own photocopier.[23] The Vermont Supreme Court in 1970 expressly held that the right to inspect and make hand copies of records did not create the additional right to make or receive photocopies.[24]

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[20] Miss. Code Ann. § 25-61-5 (1991).

[21] Calif. Gov't. Code § 6256 (West 1993 Supp.); Ind. Code Ann. § 5-13-3-3(b)(1) (Burns 1987); Ky. Rev. Stat. Ann. § 61.874(1) (Baldwin 1992 Supp.); La. Rev. Stat. Ann. § 44:32 C.(1) (West 1982); Md. State Gov't Code Ann. § 10-620(1)(i) (1993); Mass. Gen. Laws Ann. § 10(a) (West 1988); Minn. Stat. Ann. §13.03(Subd. 3) (West 1993 Supp.); N.J. Rev. Stat. § 47:1A-2 (West 1993 Supp.); Ohio Rev. Code Ann. §149.43(B) (Baldwin 1990); W.Va. Code § 29B-1-3(4)(a) (1993); Wyo. Stat. Ann. § 16-4-204(a) (1990).

[22] See Mont. Code Ann. § 2-6-102 (1991); N.C. Gen. Stat. § 132-6 (1991), and Utah Code Ann. § 63-2-201(7) (1992 Supp.) Utah law also provides that "a governmental entity shall provide a record in a particular format" if the entity is reasonably able to do so and the requester is willing to pay expenses. Id. at § 63-2-201(8)(b) (1992 Supp.) This may imply a general right to receive copies, but it may also be read more narrowly as allowing a requester to obtain government information in an electronic format when it is available.

[23] Vt. Stat. Ann. tit. 1, § 316(b) - (c) (1985).

[24] Matte v. City of Winooski, 271 A.2d 830 (Vt. 1970).

The court based its decision on the principle of administrative convenience and the possibility that a photocopier might damage a public record.[25]

The New Hampshire Supreme Court reached a similar conclusion in 1981, holding that state law did not require public agencies to furnish copies but only to allow persons seeking access an opportunity to copy or reproduce them.[26] Georgia law says persons have a right to make photographic reproductions of records,[27] but the attorney general has interpreted that to mean that records custodians have discretion as to whether they will provide copies or make the originals available for copying by the requester.[28] An Arkansas attorney general's opinion has concluded that the state law does not require public officials to provide copies.[29] In spite of these few cases, the question of the right to receive copies of public records rarely arises, suggesting that photocopying is not a burden to most officials.

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[25] Id. at 832.

[26] Gallagher v. Town of Windham, 427 A.2d 37 (N.H. 1981). This holding seemed to contradict an earlier decision, Menge v. Manchester, 311 A.2d 116 (N.H. 1973), in which the New Hampshire Supreme Court found that a requester had a right to obtain a copy of a computer tape. In Menge, however, the decision was based on the ease and low cost of making copies of computer tapes. In Gallagher, the evidence indicated that the copies requested could be made only at considerably more expense and trouble. The court also admonished public agencies that they should strive to assist the public in all reasonable ways. 427 A.2d at 40-41.

[27] Ga. Code Ann. §50-18-71(a) (Harrison 1991).

[28] Ga. Op. Att'y Gen. No. 84-39 (June 28, 1984). The rule is the same in Wisconsin where the law says the custodian has the choice of either letting the requester make her or his own photocopy or providing a photocopy. Wis. Stat. Ann. § 19.35(1)(b) (West 1986).

[29] Informal Opinion to Barry L. Molder (March 25, 1982) cited in Watkins, supra note 13, at 830.

II. The Calculation of Fees

A. Paper Records

A number of states simplify the problem of calculating fees for copies by imposing statutory fees or statutory minimums or maximums. New Jersey charges 75 cents per page for up to 10 pages, 50 cents per page for the next 10 pages, and 25 cents per page for any pages beyond 21.[30] Massachusetts prescribes by statute the fees for copies from state law enforcement agencies.[31] Several other states set statutory maximum fees, leaving individual agencies the option of charging less. New York says the fee for photocopies cannot exceed 25 cents per legal-size page or the actual cost of providing the records.[32] Oklahoma says that in no instance shall the fee for a plain copy up to legal size exceed 25 cents per page or $1 for a certified copy.[33] Some states, such as Hawaii,[34] allow administrative agencies to establish or review copy fees.[35] Texas law requires the state Purchasing and General Services Commission to adopt and periodically revise guidelines on the actual cost of making standard-sized copies. Governmental bodies may use these guidelines in setting copy fees, but apparently, the guidelines are not binding. The only requirement is that the fees not be excessive.[36]

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[30] N.J. Stat. Ann. § 47:1A-2 (West 1993 Supp.).

[31] Mass. Gen. Laws Ann. ch. 66 § 10(a) (West 1993 Supp.).

[32] N.Y. Pub. Off. Law §§ 87(1)(b)(iii) (agency records) and 88(1)(c) (legislative records) (McKinney 1988).

[33] Okla. Stat. Ann. tit. 51 § 24A.5(3) (West 1993 Supp.). Other statutes imposing maximum fees are Colo. Rev. Stat. §24-72-205(1) (1988) ($1.25); Conn. Gen. Stat. Ann. § 1-15(a) (West 1993 Supp.) (50 cents); Fla. Stat. Ann. § 119.07(1)(a) (West 1992 Supp.) (15 cents; 20 cents for two-sided page); Ga. Code Ann. § 50-18-71(c) (Harrison 1991) (25 cents); Ind. Code Ann. § 5-14-3-8(c) (Burns 1987) (10 cents or the average copying cost for state agencies, whichever is greater; applies only to fees charged by state agencies); R.I. Gen. Laws § 38-2-4(a) (1992 Supp.) (15 cents, not including search charges).

[34] Hawaii Rev. Stat. § 92F-42(13) (1992 Supp.).

More common than statutes that set fees are ones that give general guidance to officials on how much to charge for copies of public records by saying that public agencies may assess "reasonable" fees[37] for copies or that fees should be limited to the actual or direct costs of providing the copies.[38] A few mention both "reasonable" fees and actual or direct costs.[39]

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[35] Ind. Code Ann. § 5-14-3-8(c) (Burns 1987) (directs Department of Administration to establish a uniform fee for standard-sized documents not to exceed the average cost of copying for state agencies or 10 cents per page, which ever is greater); Kan. Stat. Ann. § 45-219(c)(5) (1986) (copy fees for state executive agencies must be approved by the Director of Accounts and Reports); La. Rev. Stat. Ann. § 44:32(C)(2) (West 1982) (Commissioner of Administration to adopt uniform fee schedule for state agencies); Mass. Gen. Laws. Ann. ch 66 §§ 1 and 10 (West 1988) (giving Supervisor of Public Records power to adopt regulations implementing open records law, including setting reasonable fees state and local agencies may charge for copies) (Mass. Op. Att'y Gen. No. 10, Oct. 20, 1977, p. 92-93).

[36]; Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(a) (Vernon 1993 Supp.).

[37] Colo. Rev. Stat. § 24-72-205(1) (1988); Del. Code Ann. tit. 29 § 10003(a) (1991); Ga. Code Ann. § 50-18-71(d) (Harrison 1991) (allows reasonable fees for search, retrieval, and other direct administrative costs); Ill. Comp. Stat. Ann. ch. 5 § 140/6(a) (Smith-Hurd 1993); Ky. Rev. Stat. Ann. § 61.874(2) (Baldwin 1992 Supp.); La. Rev. Stat. Ann. § 44:32(C)(1) (West 1982) (governs fees established by governmental agencies that are not state agencies); Md. State Gov't Code § 10-621(a) (1993); Mass. Gen. Laws. Ann. ch. 66 § 10(a) (1988) (Supervisor of Public Records has authority to determine what are reasonable fees); Miss. Code Ann. § 25-61-7 (1991); Okla. Stat. Ann. tit. 51 § 24A.5(3) (West 1993 Supp.); Ore. Rev. Stat. § 192.440(3) (1991); Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(a) (Vernon 1993 Supp.); Utah Code Ann. § 63-2-203(1) (1992 Supp.); Va. Code § 2.1-342(A) (1992 Supp.); Wash. Rev. Code Ann. § 42.17.300 (1991); W.Va. Code § 29B-1-3(5) (1993); Wyo. Stat. § 16-4-204(b) (1990).

[38] Calif. Gov't Code § 6257 (West 1993 Supp.); D.C. Code Ann. § 1-1522(b) (1992); Fla. Stat. Ann. § 119.07(1)(a) (West 1982); Idaho Code § 9-338(8) (1990); Iowa Code Ann. § 22.3 (West 1989); Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.); Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.); Mo. Ann. Stat. § 610.026(1) (Vernon 1988); N.H. Rev. Stat. Ann. § 91-A:4(IV) (1990); N.Y. Pub. Off. Law §§ 87(1)(b)(iii) and 88(1)(c) (McKinney 1988); Ohio Rev. Code Ann. § 149.43(B) (Baldwin 1990); S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991); Vt. Stat. Ann. tit. 1 § 316(b) (1985); Wis. Stat. Ann. § 19.35(3)(a) and (b) (West 1986 and 1992 Supp.).

California says public agencies should promptly furnish copies of public records to any person "upon payment of fees covering direct costs of duplication...."[40] Vermont says persons requesting copies of public records may be charged "the actual cost of providing the copy...."[41] Delaware allows custodians to recover "[a]ny reasonable expense involved in the copying" of records.[42] Several states, however, provide no statutory guidance on fees public officials may charge for providing copies of records.[43]

Many statutes dealing with fees for copies of public records identify factors that may be considered in calculating reasonable fees or contribute to the actual or direct cost of providing copies. Among the factors are the costs of reproduction; labor; search and retrieval; review, preparation, and segregation; supervision and use of facilities; and mailing. Each of these factors will be considered in turn.

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[39] Among the states that limit fees both by reasonableness and by the actual, direct, or necessary costs are Illinois, Kentucky, Massachusetts, Mississippi, Oklahoma, Oregon, Utah, Virginia, and Washington.

[40] Calif. Gov't Code § 6257 (West 1993 Supp.).

[41] Vt. Stat. Ann. tit. 1 § 316(b) (1985).

[42] Del. Code Ann. tit. 29 § 10003(a) (1991).

[43] Ala. Code § 36-12-40 (1991); Alaska Stat. § 09.25.120 (1992); Ark. Stat. Ann. § 25-19-105 (1992); Me. Rev. Stat. Ann. tit. 1 § 408 (1989); Mont. Code Ann. § 2-6-102 (1991) (but see § 2-6-103 which prescribes fees the secretary of state may charge for making copies of records); Neb. Rev. Stat. § 84-712; N.M. Stat. Ann. § 14-2-2 (1988); N.C. Gen. Stat. § 132-6 (1991); N.D. Cent. Code § 44-04-18 (1987); Pa. Stat. Ann. tit. 65 § 66.3 (1959) ; S.D. Codified Laws Ann. § 1-27-1 (1992); Tenn. Code Ann. § 10-7-506 (1992). Some states, Pennsylvania and Tennessee for example, allow records custodians to make reasonable regulations governing the making of copies or extracts, and such provisions could be construed to apply to fees as well as the physical circumstances under which the copies are made.

i. Reproduction

While many statutes mention reproduction costs, they do so in a very general manner, simply authorizing public agencies to charge copy fees that would allow them to recover the actual cost of reproducing documents.[44] The laws rarely spell out how the actual cost of reproduction or duplication should be calculated. Usually, reproduction costs seem to include copier costs, paper, and supplies, although sometime agencies try to include other expenses.

In 1981, a New York Supreme Court held a $4 fee for copying tax maps excessive.[45] The county had broken down the charge as 70 cents per sheet copier expense, 40 cents per sheet for paper, 5 cents per sheet for activator, and $2.72 for map maintenance expense.[46] The court disallowed the $2.72 charge for map maintenance but upheld the $1.15 in charges for duplication costs. State administrative regulations defined actual reproduction cost as "average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."[47] The court said the duplication charges seemed to fit this definition and were supported by the fact that the charge was in line with the single-copy retail price for tax maps.[48]

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[44] D.C. Code Ann. § 1-1522(b) (1992); Idaho Code § 9-338(8) (1990); Ill. Comp. Stat. Ann. ch. 5 § 140/6(a) (Smith-Hurd 1993); Iowa Code Ann. § 22.3 (West 1989); Md. State Gov't Code Ann. § 10-621(a) (1993); Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.); Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.); Miss. Code Ann. § 25-61-7 (1992); Mo. Ann. Stat. § 610.026(1) (Vernon 1988); N.H. Rev. Stat. Ann. § 91-A:4(IV) (1990); Okla. Stat. Ann. tit. 51 § 24A.5(3) (West 1993 Supp.); S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991); Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(a) (West 1993 Supp.); Utah Code Ann. § 63-2-203(1) (1992 Supp.); Va. Code § 2.1-342(A) (1992 Supp.); Wis. Stat. Ann. § 19.35(3)(a) (1986).

[45] Szikszay v. Buelow, 436 N.Y.S.2d 558 (N.Y. Sup. Ct. 1981).

[46] Id. at 561.

[47] N.Y. Admin. Code tit. 21, § 1401.8(c)(3) cited in Szikszay at 562.

Similarly, an Ohio district court found a copy charge of $1 per page excessive because evidence showed the actual cost was only 7 cents per page.[49] The 7 cents per page figure was based on the governmental agency's own calculations as to the cost of the toner, paper, and officer's time spent making the copies.[50] Even though the evidence indicated that the cost of the copying was nominal, the court, in an aside, questioned whether the low charge was good stewardship of public resources.[51]

One Kansas attorney general's opinion suggests that the "actual costs" of copying are not always scrutinized rigorously. Unified School District 431 in Barton County, Kan., was charging 20 per page for copies of public records. The attorney general concluded that the figure reflected the actual costs of providing the copies.[52] The district had calculated the costs in the following manner:

--Copier costs, including price of photocopying machine, maintenance and toner: 3 cents per page.

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[48] Id. at 562.

[49] State ex rel. Bonnell v. City of Cleveland, No. 64854 (Ohio Ct. App. Aug. 26, 1993) (available on LEXIS, States library, Ohio file).

[50] Id. at 3.

[51] Id. at 12.

[52] Kan. Op. Att'y Gen. No. 87-4 (Jan. 13, 1987).

--Labor for running the copier, based on the average salary, including benefits and Social Security, for central office staff: less than 1 cent per page.

--Other labor costs, including typing mailing labels, making billings, making receipts, running postage meter, providing stamps, collating copies, stapling copies, and time off from other tasks: 6.4 cents per page.

--Nine-inch by 12-inch mailing envelope: 7 cents per page.[53]

The attorney general's office was satisfied with this breakdown, noting in part that it was consistent with the policy recommended by the Kansas League of Municipalities.[54] This formula, however, charges the price of an envelope for each page of a request, when probably only one envelope is used. The same may be true for some of the "other labor costs" which would apply for an entire request and not each copy.

ii. Labor

Several state statutes specifically allow public agencies to recover labor costs associated with providing copies of public records.[55] Although Florida is one of the states that includes labor costs in copy fees, public agencies do not have unbridled discretion about imposing such charges. The town of Bay Harbor Islands tried to impose a blanket fee of $15 per request to cover the cost of clerical and supervisory assistance in handling all requests for copies of records, regardless of the size of the request.[56] A Florida circuit court ruled that the fee was inconsistent with the state law which allows fees in excess of the duplication fees only when the request is particularly complicated or voluminous.[57]

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[53] Id.

[54] Id.

[55] Fla. Stat. Ann. § 119.07 (West 1982) (The statute prescribes a maximum fee for copies up to legal size, and limits the fee for other copies to actual costs, including labor costs. Labor costs are also allowed where the nature or volume of the request requires extensive use of government resources); Ga. Code Ann. § 50-18-71 (Harrison 1991); Kan. Stat. Ann. § 45-219(c)(1) (1986); Mich. Comp. Laws Ann. § 15.234(1) (West 1993 Supp.); Minn. Stat. Ann. § 19.35(Subd. 3) (West 1993 Supp.); Texas Rev. Civ. Stat. Ann. art. 6252-17a.(9)(a) (Vernon 1993 Supp.).

In at least one state, Wisconsin, the attorney general has concluded that labor charges may be included in copy fees, even though the statute does not specifically mention them. The Wisconsin law allows fees not in excess of the "actual, necessary and direct costs."[58] In a 1983 opinion, the attorney general said this phrase was broad enough to include labor costs associated with making copies as well as the cost of copier equipment and supplies.[59]

Two states statutorily exclude at least some labor charges from copy fees. Idaho says the fee for copies may not exceed actual cost and "shall not include any administrative or labor costs resulting from locating and providing a copy of the public record."[60] Kentucky says the fees for copies may not exceed actual costs "not including the cost of staff required."[61]

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[56] Sunbeam v. Town of Bay Harbor Islands, 5 Fla. Supp.2d 61 (Fla. Cir. Ct. 1981).

[57] Id. at 63.

[58] Wis. Stat. Ann. § 19.35(3)(a) (West 1986).

[59] Wis. Op. Att'y Gen. 40-83 (Sept. 16, 1983).

[60] Idaho Code § 9-338(8) (1990).

[61] Ky. Rev. Stat. Ann. § 61.874(2) (Baldwin 1992 Supp.).

iii. Search and Retrieval

The cost of searching for and retrieving documents may be included in copy fees under the laws of many states and the District of Columbia.[62] The South Carolina law is fairly typical, saying only that public bodies may assess fees for copies that include the "actual cost of searching for ... the records."[63] Rhode Island is somewhat more generous in the search fees it allow publics agencies to charge. Agencies may impose a "reasonable charge" for search or retrieval up to $15 an hour. The first 30 minutes of the search, however, are free.[64] Wisconsin allows search fees only when the "actual, necessary and direct cost of location" is $50 or more.[65] Idaho and Indiana specifically prohibit charges for searches.[66]

In states where the statutes are silent, some courts and attorneys general have ruled out search fees. The Arizona Court of Appeals decided in 1980 that the city of Tucson could not charge a fee for searching for documents as well as for copying them.[67] The Arizona attorney general followed this opinion in declaring that parties seeking records may not be charged for searches.[68] A 1988 Arkansas attorney general's opinion concluded that a city may not charge a person seeking access to records for the time spent retrieving the records from storage.[69]

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[62] D.C. Code Ann. § 1-1522(b) (1992); Ga. Code Ann. § 50-18-71(d) (Harrison 1990); Hawaii Rev. Stat. §92F-42(13) (1992 Supp.) (authorizes Office of Information Practices to prescribe uniform fee schedule that includes cost of search); Md. State Gov't. Code Ann. § 10-621(a) and (b) (1993); Mass. Gen. Laws Ann. § 10(a) (West 1993 Supp.); Mich. Comp. Laws. Ann. § 15.234(1) (West 1993-94 Supp.); Minn. Stat. §13.03(Subd. 3); Miss. Code Ann. § 25-61-7 (1991); Mo. Stat. Ann. § 610.026(1); R.I. Gen. Laws § 38-2-3 (1992 Supp.); S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991); Va. Code § 2.1-342(A)(4) (1992 Supp.); Wis. Stat. Ann. § 19.35(3)(c) (West 1986).

[63] S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991).

[64] R.I. Gen. Laws § 38-2-3(b) (1992 Supp.).

[65] Wis. Stat. Ann. § 19.35(3)(c) (West 1986).

[66] Idaho Code § 9-338(8) (1990); Ind. Code Ann. §5-13-3-8(b)(2) (Burns 1987).

[67] Hanania v. City of Tucson, 624 P.2d 332 (Ariz. Ct. App. 1980).

iv. Review, Preparation, or Segregation

Most states require public agencies to segregate information that is not exempt from disclosure and release it. This is, perhaps, the most laborious procedure in releasing government information.[70] A few states authorize public agencies to include review, preparation, or segregation costs in their copy fees.[71] The Michigan law directly addresses the issue of segregation, saying "the fee shall be limited to actual ... cost of search, examination, review, and the deletion and separation of exempt from nonexempt information...."[72] A separate section, however, says that the fee for separating exempt from nonexempt information shall not be imposed unless "failure to charge a fee would result in unreasonably high costs to the public body" and the public body identifies the nature of those costs.[73]

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[68] Ariz. Op. Att'y Gen. I86-090 (Aug. 25, 1986).

[69] Ark. Op. Att'y Gen. 87-481 (Jan. 8, 1988).

[70] See Scalia, The Freedom of Information Act Has No Clothes, AEI J. on Gov't and Soc'y Reg. (March/April 1982) 14, 16.

[71] Hawaii Rev. Stat. § 92F-42(13) (1992 Supp.); Md. State Gov't. Code Ann. § 10-621(a) (1993) (allows fee for preparation of records); Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.); Miss. Code Ann. § 25-61-7 (1991). While the Maryland law speaks of "preparation" rather than "segregation," the attorney general has said this includes deletion of exempt information. Office of the Maryland Attorney General, Public Information Manual 11 (5th ed. 1987).

[72] Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.).

[73] Id. at § 15.234(3).

Although the Ohio statute does not provide for recovery of segregation costs, in a recent case, a court required a records requester to make a $2,000 deposit to cover such costs.[74] The records requester wanted access to records of a county prosecutor's diversion program. Because some of the information may have been exempt from disclosure, a referee was appointed to review the documents and decide which could be withheld. The $2,000 bond was for covering the expense of the referee.[75]

In Texas, records requesters usually must pay all costs including materials, labor and other overhead, unless the request is for 50 pages or less of readily available material.[76] This has been construed to include the cost of segregating exempt information.[77] Even when the request is for less than 50 pages, the Texas attorney general says a public agency may take into account whether the records must be redacted before release in deciding whether they are "readily available."[78]

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[74] State ex rel. Fuller v. Ward, No. 1556 (Ohio Ct. App. Dec. 20, 1991) (available on LEXIS, States library, Ohio file).

[75] Id. at 3.

[76] Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(a) (Vernon 1993 Supp.).

[77] Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687-688 (Tex. 1976).

[78] Tex. Open Rec. Decision No. 488 (Feb. 23, 1988).

Of the four state statutes that prohibit charges for segregation, South Carolina's is fairly typical: "Fees may not be charged for examination and review to determine if the documents are subject to disclosure."[79]

v. Supervision and Facilities

Several states allow public agencies to charge for supervision of the inspection or copying of public records.[80] The charges for supervision seem to apply only when the custodian is not providing the copies but is supervising the copying done by the requester or done on copying equipment that does not belong to the public agency that controls the records. Wyoming, for example, allows custodians of public records to charge for supervising copying that is comparable to fee for furnishing copies. The fee for supervision applies when the copying must be done on facilities other than those of the custodian's agency.[81]

Florida allows custodians to charge for supervision only when the nature or volume of the request requires extensive use of government resources or personnel.[82] In a recent case, the Sarasota County Sheriff tried to limit efforts by a St. Petersburg Times reporter to investigate his office. Among other things, the sheriff imposed a $20 per hour fee to cover the cost of having a captain supervise the inspection of the records.[83] The circuit court held that the fee amounted to an unreasonable condition on the public right of access to information and was part of an effort to discourage and delay inspection of public records.[84]

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[79] S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991). See also Ind. Code Ann. § 5-14-3-8(b)(2) (Burns 1987); La. Rev. Stat. Ann. §44:32(C)(3) (West 1982); Minn. Stat. §13.03(Subd. 3) (1993 Supp.).

[80] Colo. Rev. Stat. § 24-72-205(2) (1988); Fla. Stat. Ann. § 119.07(1)(b) (West 1993 Supp.); Ga. Code Ann. § 50-18-71(a) (Harrison 1991); Iowa Code Ann. § 22.3 (West 1989); Kan. Stat. Ann. § 45-219(b) (1986);Md. State Gov't Code Ann. § 10-621(c)(2); Wyo. Stat. § 16-4-204 (1990).

[81] Wyo. Stat. § 16-4-204 (1990).

[82] Fla. Stat. Ann. § 119.07(1)(b) (West 1993 Supp.).

Similar to fees for supervision are those for use of facilities. Iowa, for example, lets custodians charge for the necessary expenses of providing a place where records may be copied when it is impractical to do such work in the custodian's office.[85] A couple of states now allow charges in connection with the use of new information technologies. Florida allows the imposition of a special service charge where a request for records involves extensive use of information technology resources.[86] And Minnesota recently changed its law to include the cost of electronic transmission as a factor that may be included in assessing copy charges.[87]

vi. Mailing

Some states are so large that the only way some citizens can have access to public records is through the mail. Wisconsin is one of the few states to address this issue specifically. Its statute says public agencies "may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record...."[88] Another section says no request may be refused "because the request is received by mail, unless prepayment of a fee is required...."[89] In spite of these provisions, the Wisconsin Court of Appeals recently held that the law did not require public agencies to mail copies of records to requesters.[90]

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[83] Times Publishing Co. v. Sarasota County Sheriff's Dept., 21 Fla. Supp. 2d 138 (Fla. Cir. Ct. 1985).

[84] Id. at 143-145.

[85] Iowa Code Ann. § 22.3 (West 1989). See also Kan. Stat. Ann. § 45-219(b) (1986); Md. State Gov't Code Ann. § 10-621(c)(3) (1993); Wash. Rev. Code Ann. §42.17.300 (1991); Wyo. Stat. § 16-4-204(b) (1990).

[86] Fla. Stat. Ann. §119.07(b) (West 1993 Supp.).

[87] Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.).

A Wisconsin group called the Coalition for a Clean Government wanted the police chief of Fox Lake, James E. Larsen, to mail copies of certain citations to the coalition. A $3 check to cover copying costs accompanied the request. Larsen answered that he did not have enough manpower to fulfill the request. The coalition sued, arguing that Larsen had violated the public records law.[91] The court of appeals agreed with the police chief's argument that he was under no obligation to mail copies of documents. Section 19.35(1)(b) of the public records law gives the custodian the option of providing copies or providing the requester an opportunity to inspect the documents. Larsen had satisfied the law by agreeing to make the records available for personal inspection.[92] The coalition argued that it would be unreasonable to require persons to travel great distances to inspect public records. The court said that was an issue for the Legislature.[93]

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[88] Wis.Stat. Ann. §19.35(3)(d) (West 1986). Michigan and Mississippi also expressly provide for collecting fees for mailing. Mich. Comp. Laws Ann. §15.234(1) (West 1993-94 Supp.) and Miss. Code Ann.§ 25-61-7 (Law. Co-op. 1991).

[89] Id. at § 19.35(1)(i). Washington also requires agencies to honor requests by mail for access to records. Wash. Rev. Code Ann. §42.17.270 (1991). Kentucky says public agencies shall mail copies of records to requesters who live outside the county in which the records are located. Ky. Rev. Stat. Ann. §61.872(3)(b) (Baldwin 1992).

[90] *Coalition for a Clean Government v. Larsen*, 479 N.W.2d 576 (Wis. Ct. App. 1991).

[91] *Id*. at 577.

[92] *Id*. at 578.

At least three Ohio cases deal with the right to receive copies of public records by mail, and all reached the same conclusion as that in the Larsen case. The earliest of the Ohio cases involved a genealogist who wanted the Ohio Historical Society to mail her uncertified copies of birth certificates. The society charged 25 cents per copy when the requester appeared in person, but when the requester wanted the copies mailed, the fee was $6 for members and $8 for nonmembers (later changed to $7 for all requesters). The genealogist thought the charge was excessive and sued.[94] The Ohio Supreme Court concluded that to read the statute as requiring custodians of public records to mail copies on request would amount to adding words to the statute. The court said the Legislature was better equipped to determine what a duty to mail copies might cost public agencies and how they should be compensated.[95]

Following the Fenley decision, the Ohio Supreme Court reversed an appeals court ruling that a public agency had a duty to mail copies or originals of records to a prisoner. Again, the court said the law imposed no such duty on public agencies.[96] In February 1993, the Ohio Court of Appeals reached a similar decision in another case involving a prisoner.[97]

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[93] Id. at 579.

[94] State ex rel. Fenley v. Ohio Historical Society, 597 N.E.2d 120 (Ohio 1992).

[95] Id. at 122-123.

B. Electronic Records

The general rule is that information that is a public record in paper form remains so when it is stored in electronically. Most states have language that defines a public record to mean records prepared or held by a public agency "regardless of physical form or characteristics."[98] Even though electronic records are accessible under state open records laws, these records present new, and largely untested, problems in assessing fees for copies. For the most part the only provisions on fees are the general ones saying fees should be reasonable or reflect the actual or direct costs of reproduction. Some state agencies have tried to apply the same standards for making copies of paper documents to copying electronic records, often with absurd results. The state of Ohio in 1989 wanted $21 million from the Dayton Daily News for a computer tape of its drivers' license records ($3 for each record). The paper eventually arranged to purchase the tape for $400.[99]

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[96] State ex rel. Nelson v. Fuerst, 607 N.E.2d 836 (Ohio 1993).

[97] State ex rel. Cornell v. Cleveland Police Dep't, No. 64580 (Ohio. Ct. App. Feb. 1, 1993) (available on LEXIS, States Library, Ohio file).

[98] Davidson Scott, supra note 19.

[99] Id. at 10pc. But see Shippen v. Department of Motor Vehicles, 208 Cal.Rptr. 13 (1984) in which a California appeals court upheld a charge of $30 per 1,000 records for computerized information even though the cost of producing the information was only 78 cents per 1,000 records. The court upheld the higher charge on the ground that the Vehicle Code allowed the department to set its own fees and, therefore, was an exception to the general limitations on fees in the Public Records Act.

Some states have concluded that the methods for calculating fees for paper copies should not apply to electronic records. The Georgia attorney general noted in a 1989 opinion that the statutory fee of 25 cents a page was not readily applicable to computer records. He advised public agencies to keep in mind the "legislative policy which permits minimum charges for such standard requests...."[100] Similarly, the Iowa attorney general advised the state ombudsman that charges for access to electronic records should reflect only the actual expenses of facilitating access and copying and should not be used to raise revenue.[101]

A few states have identified such factors as the media for copying, computer time, and labor as factors to be considered in the calculation of fees. Whether the data have commercial value or will be used for commercial purposes also affect fees in some states. A variety of special fees are mentioned in some statutes, cases, and attorney generals' opinions.

Georgia amended its provisions on fees for copies in 1992 to include the cost of the blank computer disk or tape for making electronic copies and the administrative time involved in handling requests for electronic information.[102] Montana and Connecticut also allow charges for the media or storage devices provided to requesters of copies of electronic records.[103]

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[100] Requests for computer generated information in light of the Open Records Act, Ga. Op. Att'y Gen. No. 89-32 (June 30, 1989).

[101] Public Records: Examination and copying, Iowa Op. Att'y Gen. 81-8-18 (Aug. 13, 1981). The attorney general expressly approved the Department of Transportation's scheme for providing copies of its computerized listing of individuals with revoked, suspended, or cancelled drivers' licenses. The department would make copies of the two magnetic tapes containing the information for requesters who provided two blank tapes and paid a flat fee of $35 per tape.

[102] Ga. Code Ann. § 50-18-71 (Harrison 1992 Supp.).

[103] Conn. Gen. Stat. Ann. § 1-15(b)(3) (West 1993 Supp.); Mont. Code Ann. § 2-6-110(2)(a) (1991).

Computer or mainframe time is mentioned in a few state statutes. Connecticut allows agencies to charge records requesters for computer time incurred in responding to requests when the records are stored and retrieved by another agency or a contractor.[104]

Some states allow special fees that are not easily categorized. Minnesota, for example, says public agencies can charge for the electronic transmittal of copies of public data.[105] Colorado public agencies that manipulate data to respond to a request may charge for that manipulation. Also, if the record is a result of a computer output other than word processing, the agency may charge the requester a reasonable portion of the cost of creating and maintaining the records system as well as a for the recovery of the actual costs associated with making the copies.[106]

Courts have upheld various fees applied to requests for copies of computer records that could not be applied to copies of paper records. One early case involved a request by the Catholic Bulletin for a tape that would identify the Minnesota physicians who performed abortions.[107] The Department of Public Welfare was willing to release a redacted copy of the computer tape if the Catholic Bulletin agreed to pay the costs of reprogramming the computer to make the copy. The estimated cost was $2,500 to $4,000, which would represent the full cost of retrieving the data. The trial court agreed that the fee was appropriate, and the state Supreme Court said the Minnesota Medical Association, which was challenging the release of the tape, could not argue that the requester was not paying the full cost of retrieving the data.[108]

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[104] Conn. Gen. Stat. Ann. § 1-15(b)(4) (West 1993 Supp.) See also Kan. Stat. Ann. § 45-219(c)(2) (1986); Mont. Code Ann. §2-6-110(2) and (3); Va. Code § 2.1-342(A) (1992 Supp.). Kansas and Montana also mention labor costs or staff time as expenses that can be charged to records requests. Other states that allow charges for labor are Connecticut, Georgia, and Missouri. Conn. Gen. Stat. Ann. § 1-15(b)(1) (West 1993 Supp.); Ga. Code Ann. §50-18-71(f) (Harrison 1992 Supp.); Mo. Ann. Rev. Stat. § 610.026(2) (West 1988).

[105] Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.).

[106] Colo. Rev. Stat. § 24-27-205(3) and (4) (1992 Supp.) See also Conn. Gen. Stat. Ann. § 1-15(b)(2) (West 1993 Supp.) (allowing agency to charge for engaging outside electronic processing services); Idaho Code § 9-338(8) (1990) (permits fees not exceeding the sum of the direct cost of copying and the standard cost, if any, for selling the information as a publication); Ind. Code Ann. §5-14-3-8(g) (Burns 1987) (similar to Idaho law, but also allows Legislative Services Agency to charge for the maintenance of its computer system); Me. Rev. Stat. Ann. tit. 1 § 408 (1989) (allows charges where the data is in a mechanical or electronic format and must be translated before it can be inspected); Mont. Code. Ann. § 2-6-110 (1991) (recovery of "out-of-pocket expenses directly associated the request for information" permitted); Utah Code Ann. § 63-2-201(8)(b) (1992 Supp.) (requester may be required to reimburse a government agency for any additional cost of providing the record in a specifically requested format).

A major issue on access to computerized information is whether the requester is entitled to received the information in the form in which he or she requests it. This issue has been discussed elsewhere,[109] but deserves treatment here since denial of an electronic record in an electronic format can amount to an additional fee for access. Computer tapes contain large amounts of data, which can be analyzed and put to a variety of uses by a data requester. But if the data cannot be obtained in an electronic format, the cost of converting it can be prohibitive.[110]

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[107] Minnesota Medical Association v. Minnesota, 274 N.W.2d 84 (Minn. 1978).

[108] Id. at 86-87. See also State ex rel. Stephan v. Harder, 230 Kan. 573 (1982) upholding a charge of $2,000 in programming fees and $3,600 for computer time for a requester who wanted a redacted copy of a computer tape with the names of physicians who performed abortions at public expense, and Ky. Op. Att'y Gen. 88-19 (March 14, 1988) concluding that a $172 fee for programming and other software costs associated with preparing a list not kept by an agency was reasonable.

[109] See Davidson Scott, supra note 19, at 10pc., and Annot., 86 A.L.R.4th 786 at 794-799.

[110] Bender, Computer Records, IRE Journal, Fall 1987, at 12.

California law flatly says, "Computer data shall be provided in a form determined by the agency."[111] A few other states give records custodians the discretion to choose the format in which the information will be released or require only the release of a printout.[112] Other states clearly say copies should be furnished in the format specified by the requester if they are available in that format.[113]

The courts that have considered the question and have found at least a limited right for the requester to receive copies of public records in electronic format usually have done so on the basis that access to the electronic version is less costly than providing paper copies. In Menge v. City of Manchester, a Dartmouth College professor of economics wanted a copy of a computer tape containing real estate tax assessment information.[114] One of the issues in the case was how much cheaper it would be for the requester to have access to the tape rather than to the underlying paper documents. It would have cost the professor $10,000 to manually inspect the assessment cards; but the cost of copying the tape was $45, plus $10 for a blank tape and $40 to $100 for preparing a block-out program to protect confidential information.[115] The New

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[111] Cal. Gov't Code § 6256 (West 1993 Supp.).

[112] Ind. Code Ann. § 5-14-3-3(c) (1987); N.H. Rev. Stat. Ann. § 91-A:4(IV) (1990); R.I. Gen. Laws § 38-2-3(e) (1990); Wis. Stat. Ann. § 19.35(e) (West 1986).

[113] Ore. Rev. Stat. § 192.440(2) (1991); S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991); Utah Code Ann. § 63-2-201(b) (1992 Supp.); W.Va. Code § 29B-1-3(3) (1993). Virginia may also be in this group; its law says, "Public bodies may, but shall not be required to, ... convert an official record available in one form into another form at the request of a citizen." Va. Code § 2.1-342 (1992 Supp.).

[114] 311 A.2d 116 (N.H. 1973).

[115] Id. at 117-118.

Hampshire Supreme Court concluded that the requester was entitled to obtain a copy of the tape. "The ease and minimal cost of the tape reproduction as compared to the expense and labor involved in abstracting the information from the field cards are a common sense argument in favor of the former," the court said.[116]

Courts in New Mexico and New York have reached similar conclusions. In Ortiz v. Jaramillo, the New Mexico Supreme Court overturned a lower court decision denying a political party an opportunity to purchase a copy of a computer tape containing voter registration information.[117] The records custodian did not deny that the information was public in paper form. The only issue was the right to obtain a copy of the computer tape.[118] The New Mexico Supreme said, "We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection, and safety."[119] More recently, a New York Supreme Court and the Appellate Division said records requesters could obtain records in electronic formats at least where it was more economical for both the requester and the government.[120] Brownstone

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[116] Id. at 119.

[117] 483 P.2d 500 (N.M. 1971).

[118] Id. at 501.

[119] Id.

[120] Brownstone Publishers, Inc., v. New York City Department of Buildings, 550 N.Y.S.2d 564 (N.Y. Sup. Ct. 1990), aff'd 560 N.Y.S.2d 642 (N.Y. App. Div. 1990).

Publishers wanted a copy of the Department of Buildings computer files with information on every parcel of real estate in New York City. The department said it would make the information available only in paper format. Printing out the request would take at least six weeks and use more than a million sheets of paper. The paper cost alone would be $10,000. Brownstone would then have to spend hundreds of thousands of dollars more to reconvert the information to an electronic format.[121] The New York Supreme Court concluded that Brownstone was entitled to receive the information in electronic format in light of the evidence that access to paper copies only would place a burden on the requester and in the absence of any evidence that providing electronic copies would pose a hardship to the department.[122]

Courts that have rejected a right to receive electronic copies have done so because of concerns about privacy interests and administrative convenience. In Kestenbaum v. Michigan State University, the Michigan Supreme Court upheld an appeals court decision denying a person a copy of the computer tape used to prepare the university's student directory.[123] A major issue was the right to privacy of the students identified on the tape. Kestenbaum argued that because the university had already published a directory with the identical information, release of the tape would not be an invasion of privacy. The Supreme Court disagreed on the grounds that computerized information could be readily manipulated and combined with other information so as to become intrusive. Moreover, the students who consented to having their names published in the directory might not have been aware of the possibility that the information would be available to others in electronic format.[124]

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[121] 550 N.Y.S.2d at 565.

[122] Id. at 556. In many of these cases, the state courts have rejected arguments that a federal Freedom of Information Act case, Dismukes v. Department of Interior, 603 F.Supp. 760 (D.D.C. 1984), should be followed as a precedent. Dismukes held that requesters had no right to demand information in an electronic format where the agency was willing to provide the same information in paper format. State courts sometimes distinguish the federal FOIA from their state laws by noting that the latter speak of access to records, implying a right of access to the manner in which the information is stored, rather than just access to information. See also AFSCME v. County of Cook, 136 Ill.2d 334, 346 (1990).

[123] 327 N.W.2d 783 (Mich. 1982) reh'g denied 417 Mich. 1103.

Although Siegle v. Barry did not directly involve the right to receive copies of computer tapes,[125] the Florida District Court of Appeals showed concern about the administrative inconveniences that might arise from access to computer data. The requesters wanted information on school district employees maintained in a computer data base. The problem was that none of the school district's 800 programs would produce the information in the format the requesters desired. They offered to design and pay for a program that would do the job, but the district refused.[126] The Florida appellate court reversed the trial court's order that the district run the special program. "An absolute rule permitting access to computerized records by a specially designed program could well result in a tremendous expenditure of time and effort for the mere sake of translating information readily and inexpensively available in one format into another format...," the court said.[127]

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[124] Id. at 788-790. Similar privacy arguments were raised and rejected in Menge, 311 A.2d at 119, and Ortiz, 483 P.2d at 502.

[125] 422 So.2d 63 (Fla. Dist. Ct. App. 1982). The parties stipulated that the requesters would be allowed to make copies of computer tapes.

[126] Id. at 64-65.

[127] Id. at 66. Accord Hoffman v. Pennsylvania Game Commission, 455 A.2d 731 (Pa. Commw. Ct. 1983), holding that the decision about the manner in which public information should be released is best left to the discretion of the agency with custody of the records. Cf. Higg-a-Rella, Inc., v. County of Essex, No. ESX-L-18280-91 (N.J. Super. Ct. Law Div. March 31, 1993) (available on LEXIS, States library, New Jersey file), finding no obligation on the part of a county to copy a computer tape where the tape was not required by law to be kept and the public interest in disclosure

A factor that can complicate the cost equation for copies of computer records is the commercial value of data or the commercial purposes of the requester. Minnesota allows public agencies to charge an additional fee when persons seek access to government data that has commercial value.[128] The fee must relate to the actual development costs of the information and must be explained and justified by the agency. The statute defines commercially valuable data as "a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, data base, or system developed with a significant expenditure of public funds by the agency...."[129] Tennessee allows agencies to collect additional fees for copies of commercially valuable computer-generated maps and other geographic data.[130] The additional fees allowed include labor costs; the cost of design, development, testing, and implementation of the system; and fees to ensure that the data system is kept complete and current. Once the developmental costs of the data system have been paid, agencies may charge only for keeping the system accurate, complete and current.[131]

Where there is no provision allowing public agencies to recover for the commercial value of records, courts have been reluctant to allow such fees. The Mississippi Republican Party

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was minimal because of the requester's commercial purpose.

[128] Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.).

[129] Id.

[130] Tenn. Code Ann. § 10-7-506(c) (1992).

[131] Id. Virginia also allows a special fee for copies of topographical maps that encompass a contiguous area of 50 acres or more. Va. Code. § 2.1-342(A) (1992).

sought from the Department of Public Safety a computer tape with a complete list of drivers license records. The department wanted to charge $250 for the copying and 5 cents for each name for a total of $75,000. The Republican Party was willing to pay only $500, so it sued.[132] Among the arguments advanced by the Department of Public Safety in support of the fee was the claim that it was entitled to recover for the commercial value of the records. The court dismissed this as without merit in the absence of any legislative authorization for agencies to charge for a public record's commercial value.[133]

Where there is evidence that the records requester wants the information for commercial purposes, some states specifically allow higher fees or otherwise limit access. Arizona requires requesters who want records for commercial purposes, such as resale or as a source of names and addresses of potential customers, to provide a certified statement of the commercial purpose.[134] Once a commercial purpose has been established, the custodian may charge the requester for the cost of obtaining the original record, a reasonable fee for reproduction, and the value of the reproduction on the commercial market.[135] If the custodian thinks the commercial use is an improper one, he or she may apply to the governor for an executive order prohibiting the furnishing of copies.[136] Georgia allows public agencies to deny access to public records when the purpose of the requester is a commercial one. Requesters must agree in writing not to use the information for commercial purposes (defined to exclude newsgathering).[137]

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[132] Roberts v. Commissioner of Public Safety, 465 So.2d 1050 (Miss. 1985).

[133] Id. at 1054.

[134] Ariz. Rev. Stat. Ann. § 39-121.03(A) (1985).

[135] Id. See also Okla. Stat. Ann. tit. 51 § 24A.5(3) (West 1993 Supp.) (allowing search charges where documents are sought for commercial purposes).

In 1987, an Oklahoma attorney sought from the state Tax Commission an extensive amount of data relating to its administration of the Unclaimed Property Act.[138] Although some of the information was private, the Tax Commission was willing to furnish the public information for $608, a fee that the attorney considered excessive. The state Supreme Court upheld the fee, however, in light of evidence that the attorney wanted the information for commercial purposes.[139]

III. Fee Waivers

Various states allow fee waivers under one or more of several circumstances. The most common basis for a fee waiver is where release is in the public interest, but a few states also waive fees for persons who are indigent. Other states reduce or waive certain fees for small requests.[140]

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[136] Id. § 39-121.03(B).

[137] Ga. Code Ann. § 50-18-70(d) (Harrison 1992 Supp.). See also Ks. Stat. Ann. § 45-220(c) (1986) (requires requester to promise in writing that information will not be used for commercial purposes where the information is available for only limited purposes).

[138] Merrill v. Oklahoma Tax Commission, 831 P.2d 634 (Okla. 1992).

[139] Id. at 642-643. But cf. Finberg v. Murnane, 623 A.2d 979 (available on LEXIS, States library, Vermont file) (1992), holding that city could not prohibit access to public records for commercial use where state Public Records Act affords access to any person.

A. Public Interest Waivers

The most common reason for waiving or reducing fees is that the agency disclosing the information finds it is in the public interest.[141] The Wisconsin formulation of this waiver is fairly typical: "An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest."[142] Missouri defines "public interest" as contributing "significantly to public understanding of the operations or activities of the public governmental body and ... not primarily in the commercial interest of the requester."[143] Illinois law says the public interest is served if the information concerns "the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit."[144]

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[140] A few states grant fee waivers under some circumstances to persons who need public records in order to pursue a claim with the Department of Veterans Affairs. Alaska Stat. § 09.25.121 (1992); Neb. Rev. Stat. § 84-712.02 (1988); N.M. Stat. Ann. § 14-2-2.1 (1988).

[141] Conn. Gen. Stat. Ann. § 1-15(d)(3) (West 1993 Supp.); D.C. Code Ann. § 1-1522(b) (1992); Hawaii Rev. Stat. § 92F-42(13) (1992 Supp.); La. Rev. Stat. Ann. § 44:32(C)(2) (West 1982) (waiver where copies will be used only for a public purpose, including but not limited to a hearing before a regulatory agency); Ill. Comp. Stat. Ann. ch. 5 § 140/6 (Smith-Hurd 1992); Md. State Gov't Code Ann. § 10-621(d) (1993); Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.); Mo. Ann. Stat. § 610.026 (Vernon 1988); Okla. Stat. Ann. tit. 51 § 24A.5(3) (West 1993 Supp.) (waiver applies only to search fees); Ore. Rev. Stat. § 192.440(4) (1991); S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991); Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(g) (Vernon 1993); Utah Code Ann. § 63-2-203(3)(a) (1992 Supp.); Wis. Stat. Ann. § 19.35(3)(e) (West 1986).

[142] Wis. Stat. Ann. § 19.35(3)(e) (West 1986).

[143] Mo. Ann. Stat. § 610.026 (Vernon 1988).

[144] Ill. Comp. Stat. Ann. ch. 5 § 140/6 (Smith-Hurd 1992).

BEST COPY AVAILABLE

B. Indigency

Only a few states statutorily allow a fee waiver to records indigent requesters.[145] Unless there is an express provision for a fee waiver for indigent persons, courts will not recognize one. Several of these cases have involved prisoners. A typical case is McBride v. Wetherington.[146] McBride was an inmate who wanted copies of records relevant to the crime for which he was convicted. The custodian offered to provide the copies at the statutory fee of 25 cents a page, for a total of $2.50. McBride argued that because he was indigent, he should get the copies for free, but the appeals court disagreed, saying the state law allowed no fee waiver for indigency.[147] Courts in several other states have followed this approach.[148]

Michigan has a statutory provision allowing indigent persons to receive a fee waiver, but actually getting the waiver may be difficult. Michigan courts have upheld denial of waivers where the requesters failed to satisfy procedural requirements. In one case, an inmate was denied a waiver of the $80 fee for copying of his treatment records from the Center for Forensic Psychiatry. The Michigan Court of Appeals said the fee was proper because the inmate failed to attach an affidavit of indigency to the request.[149] In another case, the Michigan Court of Appeals upheld a denial of a fee waiver to a prisoner who had filed an affidavit of indigency. However, the inmate's name had not appeared on the prison's indigency list; therefore, denial of the waiver was not arbitrary or capricious.[150]

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[145] Conn. Gen. Stat. Ann. § 1-15(d)(1) (West 1993 Supp.); La. Rev. Stat. Ann. § 44:32(C)(2) (West 1982); Md. State Gov't Code Ann. § 10-621(d)(2) (1993) (instructs custodians to take into consideration the requester's ability to pay); Mich. Comp. Laws Ann. § 15.234(1) (West 1993-94 Supp.) (waiver limited to first $20 of charges; § 791.230(3) denies this waiver to prisoners); Utah Code Ann. § 63-2-203(3)(c) (1992) (waiver applies only when the requested documents directly implicate the requester's legal rights).

[146] 199 Ga.App. 7 (1991).

[147] Id. at 8.

[148] Yanke v. State, 588 So.2d 4 (Fla. Dist. Ct. App. 1991); Friend v. Rees, 696 S.W.2d 325 (Ky. Ct. App. 1985); Whitehead v. Morgenthau, 552 N.Y.S.2d 518 (N.Y. Sup. Ct. 1990); State ex rel. Mayrides v. City of Whitehall, 575 N.E.2d 224 (Ohio Ct. App. 1990); Thompson v. Peterson, No. B14-90-00680-CV (Tex. Ct. App. July 11, 1991) unpublished (available on LEXIS; States library, Texas file); George v. Record Custodian, 485 N.W.2d 460 (Wis. Ct. App. 1992).

C. Small Requests

Requests that involve small numbers of documents or little effort to fulfill are entitled to reduced or waived fees in some states. Maryland prohibits charging a fee for the first two hours of searching.[151] Michigan will not impose fees for search, examination, review, and segregation unless failure to do so would result in identifiable and unreasonably high costs to the public agency.[152] Texas law says that requests for 50 pages or less of readily available information need not be subject to the requirement that copy fees include all costs of materials, labor and overhead.[153] Wisconsin prohibits search fees where the cost of the search would be $50 or less.[154]

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[149] Kearney v. Department of Mental Health, 425 N.W.2d 161 (Mich. Ct. App. 1988).

[150] Williams v. Martimucci, 276 N.W.2d 876 (Mich. Ct. App. 1979).

[151] Md. State Gov't Code Ann. § 10-621(b) (1993). Rhode Island imposed no charge for the first 30 minutes of search time. R.I. Gen. Laws § 38-2-3(b) (1992).

[152] Mich. Comp. Laws Ann. § 15.234(3) (West 1993-94 Supp.).

[153] Tex. Rev. Civ. Stat. Ann. art. 6252-17a(9)(a) (Vernon 1993 Supp.).

[154] Wis. Stat. Ann. § 19.35(3)(c) (1986).

IV. Other Provisions on Fees

Miscellaneous provisions affecting fees for copies of public records appear in a number of state statutes. Among the more prominent of these are requirements that agencies use the most economical means available for responding to requests for records, limitations on voluminous requests, and fees for inspection of records.

A. Most Economical Means

Georgia specifically directs records custodians to use "the most economical means available for providing copies of public records."[155] The Maryland law says it should be construed so as to permit the inspection of public records "with the least cost and least delay to the person or governmental unit that requests the inspection."[156]

These provisions can be an effective tool for keeping copy charges to a minimum. A Georgia appeals court, for example, held that a fee of $2,231.89 for 5,364 documents was excessive.[157] The requester had asked for all bills to Clayton County submitted by any lawyer or law firm. The documents the county produced included bills for all indigent defense claims as well as other legal matters. The court granted the requester relief on the grounds that indigent defense expenditures were compiled monthly, and the county could have provided the summary more cheaply. Failure to do so violated the requirement that copies be provided by the most economical means available.[158] In Maryland, Richard C. Burke, a reporter for the Baltimore News American, won a reduction in $50,000 in fees the city wanted to charge him for access to documents about a wastewater treatment plant.[159] The major issue was whether Burke was entitled to a fee waiver because disclosure was in the public interest, but the Maryland Court of Special Appeals also said the city had failed to minimize the cost by letting Burke view the documents in advance and decide which ones he wanted copied.[160]

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[155] Ga. Code Ann. § 50-18-71(e) (Harrison 1991). See also Mich. Comp. Laws Ann. § 15.234(3) (West 1993-94 Supp.) and S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991) for similar language.

[156] Md. State Gov't Code Ann. § 10-612(b) (1993).

[157] Trammel v. Martin, 200 Ga.App. 435 (1991).

Public agencies in states that do not require disclosure by the most economical means are sometimes able to thwart access to or copying of public records. In 1966, some New Jersey citizens wanted copies of tape recordings of public hearings on a sanitary sewer project. The recordings were in the possession of the Wycoff Township Committee which had established the policy of playing the tape for members of the public or preparing typed transcripts but not allowing citizens to re-record the tape itself.[161] The New Jersey Superior Court upheld that policy. The court said that although state law gave citizens the right to purchase copies of records, that applied only to copies made by photographic processes.[162] The goal of informing the public about governmental actions was satisfied by the township's policy, and besides, tape records could be tampered with more easily than paper copies, the court said.[163] The case did not discuss the issue of the cost of preparing a transcript as opposed to copying the tape itself, but the latter would probably be cheaper. If New Jersey had had a "most economical means" clause in its law, the result in this case might have been different.

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[158] Id. at 435-436.

[159] Mayor and City Council of Baltimore v. Burke, 67 Md. App. 147 (1986). The city wanted to charge 25 cents a page for 160,000 pages of material.

[160] Id. at 157.

[161] Guarriello v. Benson, 90 N.J. Super. 233 (1966).

[162] Id. at 237-238.

B. Limits on Voluminous Requests

Several states have statutory mechanisms for limiting requests for large amounts of information. Some states require that the records be identified with particularity or specificity.[164] Others limit fee waivers for voluminous requests,[165] or they impose additional fees when the request exceeds some level of volume or complexity.[166] Still others allow custodians to reject records requests that impose unreasonable burdens on the agency.[167]

Several cases reveal judicial solicitude toward public agencies' claims that requests for records impose great administrative burdens. A San Mateo legal aid lawyer lost his effort to compel the California Department of Human Resources Development to copy more than 80,000 pages in material, even though he was willing to pay the fees.[168] The California District Court of Appeals said the right to receive copies of records was limited by a rule of reason that allowed agencies to impose reasonable restrictions on requests for large amounts of information.[169]

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[163] Id. at 240-241.

[164] Ind. Code Ann. § 5-14-3-3(a)(1) (Burns 1987); Cal. Gov't Code § 6256 (West 1993 Supp.); W.Va. Code § 29B-1-3(4) (1993); Wis. Stat. Ann. § 19.35(1)(h) (West 1986).

[165] Ill. Comp. Stat. Ann. ch. 5 § 140/6(b) (West 1992 Supp.).

[166] Okla. Stat. Ann. tit. 51 § 24A.5(3) (allows recovery of search fees when the request would cause excessive disruption to the agency's work); Wis. Stat. Ann. § 19.35(3)(c) (agency may charge for search where the cost of the search is $50 or more).

[167] Ky. Rev. Stat. Ann. § 61.872(6) (Baldwin 1992 Supp.).

In some instances, courts have been less receptive to claims that requests for records pose excessive administrative burdens. In Hearst Corporation v. Hoppe, the Washington Supreme Court held that administrative inconvenience was not a basis for denying access to records that are open under the Public Records Law.[170] The Seattle Post-Intelligencer, investigating whether the King County assessor had given special treatment to his campaign contributors, wanted to see the assessment records. Among other things, the assessor argued that the request would pose a disruptive burden on his office. The Washington Supreme Court rejected this argument, saying the Legislature had already addressed the issue and declared that openness in government was in the public interest even though it might inconvenience or embarrass public officials.[171]

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[168] Rosenthal v. Hansen, 34 Cal.App. 3d 754 (1973).

[169] Id. at 761. Accord Hines v. Board of Parole, 567 A.2d 909 (D.C. 1989); State ex rel. Zauderer v. Joseph, 577 N.E.2d 444 (Ohio Ct. App. 1989); cf. Robinson v. Merritt, 375 S.E.2d 204 (W.Va. 1988) (holding that plaintiff was not entitled to inspect and copy large numbers of workers' compensation claims in light of the privacy interests of the claimants). Compare State ex rel. Waterman v. City of Akron, No. 14507 (Ohio Ct. App. Oct. 21, 1992) (available on LEXIS, States library, Ohio file) (holding that a city's requirement that requester identify traffic accident reports by name of parties or location was unreasonable because city did not index reports by name or location).

[170] 90 Wash. 2d 123 (Wash. 1978).

[171] Id. at 132, citing Wash. Rev. Code Ann. § 42.17.340(2) (This provision is still in the law but is paragraph (3) in the 1993 Supplement.) See also Ky. Op. Att'y Gen. 91-7 (Jan. 15, 1991) concluding that public agencies have an obligation to make a good faith effort to comply even with voluminous records requests.

C. Fees for Inspection

Most states say nothing specifically about fees for inspection of records, but a few expressly prohibit them.[172] The Minnesota law, for example, says "[T]he responsible authority may not assess a charge or require the requesting person to pay a fee to inspect data."[173] This provision helped a graduate student in social science avoid paying $2,322.50 in fees to inspect Internal Affairs Complaint Forms filed with the Minneapolis Police Department.[174] Although the trial court and the Minnesota Court of Appeals agreed that the Police Department could not charge merely for the inspection of data, the department, on appeal to the Supreme Court, argued that it should be allowed to charge a fee when the documents the requester wanted to see contained both public and not-public data. The fee would pay for the cost of making copies so that non-public data could be blacked out.[175] The Supreme Court rejected this view because it could open the door to a fee for inspection.

> While photocopying might be required to comply with a request for inspection if the data contains both not public and public data, such copying would simply be a function of separating public from not public data for which a political subdivision, under the statute, may not charge.[176]

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[172] La. Rev. Stat. Ann. § 44:32(C)(3) (West 1982); Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.); Neb. Rev. Stat. 84-712 (1988); Utah Code Ann. § 63-2-201(1) (1992 Supp.); Wash. Rev. Code Ann. § 42.17.300 (1991).

[173] Minn. Stat. Ann. § 13.03(Subd. 3) (West 1993 Supp.).

[174] Demers v. City of Minneapolis, 468 N.W. 2d 71 (Minn. 1991).

[175] Id. at 74.

[176] Id. at 75.

Charges for search, retrieval, compilation, and copying or electronic transmission of data are permissible only where copies or electronic transmission have been requested, the court said.[177]

A few jurisdictions expressly permit fees for inspection of or access to records. Kansas says public agencies may prescribe "reasonable fees for providing access to ... public records."[178] Michigan has no provision allowing fees for inspecting public records, but in one case, a Michigan appellate court upheld such a charge. A woman wanted to inspect an array of records held by the University of Michigan's Institute for Social Research so that she could pursue a claim against the institute.[179] The university argued that the records were available only on microfilm and that an official would have to be present while she viewed the records to safeguard them. The requester said she would need access to the records for two or three months. The trial court granted access on the condition that after the first two weeks of viewing the records, the requester would have to pay the labor cost of having a university representative present. The requester appealed.[180] The Michigan Court of Appeals relied on language from another section of the statute (Mich. Comp. Laws Ann. § 15.233(2)) requiring public bodies to

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[177] Id.

[178] Kan. Stat. Ann. §§ 45-218(f) and 45-219(c) (1986). See also Mo. Ann. Stat. § 610.026(1) (1988) and S.C. Code Ann. § 30-4-30(b) (Law. Co-op. 1991) (allows custodians to charge a reasonable hourly fee for making records available to the public). In addition the Oregon statute contains language allowing public bodies to establish "fees reasonably calculated to reimburse it for its actual cost in making such records available...." (Ore. Rev. Stat. § 192.440(3) (1991). This sounds like a fee for access to or inspection of public records, but the passage appears in a section devoted to copying and fees for copies and might be understood as applying only in instances where copies are requested.

[179] Cashel v. Regents of the University of Michigan, 367 N.W.2d 841 (Mich. Ct. App. 1985).

[180] Id. at 843-844.

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afford "reasonable opportunity" for inspection of public records.[181] "While promoting disclosure, FOIA does not require agencies to accede to overly burdensome information requests. The requirement of the act is one of reasonableness," the court said.[182] And allowing the requester two weeks of free access to the microfilm records satisfied the reasonableness standard.[183]

V. Conclusions[184]

Several recurring features of the fee systems created by state open records laws act as barriers to access to public information. One is the vagueness of the "reasonableness" standard used by several states. Perhaps this is not surprising given that those states that statutorily set fees or maximums allow charges ranging from 10 cents a copy to $1.25.[185] The problem with the "reasonableness" standard may be that states have failed to distinguish between costs per copy and costs per request, so per copy costs are inflated with charges that should be imposed, if at all, for the request as a whole.[186] The materials that have explored copy costs most closely find the direct expenses, even including the labor associated with operating the copier, to total 5 to 7 cents a page.[187] Most of the other factors that various states include in calculating fees for copies -- labor, mailing, search, segregation of exempt material -- should be assessed for the total request, not for individual copies. This should result in charges that more accurately reflect the agency's actual expenses in fulfilling the request. Moreover, these per-request fees should be imposed only when a request reaches a certain level of complexity or volume. A person who asks for a copy of this year's city budget or tomorrow's school board agenda, documents that are readily available, should not have to pay a search fee. On the other hand, a person who asks for copies of all the bills submitted to a county by a particular lawyer over the past five years should reasonably expect to pay a search fee.

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[181] Id. at 844.

[182] Id. at 845.

[183] Id.

[184] A somewhat different set of conclusions and recommendations may be found in B. Sanford, Open Records Model Law: Revised Guidelines and Recommended Minimum Standards for Statutes Governing Public Access to Government Records and Information 8-9 (1993).

[185] See supra at note 33 and accompanying text.

[186] Kan. Op. Att'y Gen. No. 87-4 (Jan. 13, 1987) upholding a fee of 20 cents per copy is an example of this. See supra note 52 and accompanying text.

States are divided on whether the costs of segregating exempt material should be charged to the requester. Certainly, this can be a major expense in any request for records, at least paper ones, and state legislatures are understandably reluctant to put the entire burden of segregation on state and local agencies. But a better approach than imposing fees on requesters might be to encourage agencies to keep exempt and nonexempt information separate so as to reduce the cost of segregation. Missouri adopted this position in 1993.[188]

Fees for such things as search, compilation, and other expenses assessed on a per-request basis should be waived when the requester is indigent or disclosure is in the public interest. Although only a few states grant waivers for indigency, all taxpayers, rich and poor, should be have access to government information. States might elect not to waive the per- copy costs, assuming these are kept to approximately 10 cents per page. Such a minimal charge would discourage frivolous requests without unduly burdening indigent requesters.

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[187] Id. and State ex rel. Bonnell v. City of Cleveland, No. 64854 (Ohio Ct. App. Aug. 26, 1993) (available on LEXIS, States library, Ohio file) supra at note 49 and accompanying text.

[188] Mo. Rev. Stat. § 610.024(2) (1993 Supp.) directs governmental bodies to keep exempt and nonexempt information separate as much as possible when designing public records.

Some state laws and some court decisions continue to presume that access to government information in computers is difficult, expensive, and dangerous (at least to privacy). These presumptions should be reversed. The better evidence indicates that access to records in electronic formats is cheaper and more convenient for both the requester and the records custodian. Certainly, state laws should guarantee requesters the right to receive information in electronic format, if it is available; any other policy is a hidden fee. And charges for copying tapes should be kept to a minimum.[109] Certainly any limitations on or special fees for voluminous requests should be prohibited in connection with copies of computer records.

Additional fees or limitations on access where records have commercial value or the requester has a commercial purpose are another area of debate. Is it wiser to treat some data as worth more because it is commercially valuable or to treat commercial users as persons who should pay more? Neither is clearly desirable. What data is and is not commercially valuable may depend on nothing but the entrepreneurial skill of the requester. And assessing higher fees to commercial users violates the general presumption that access to government information should be as democratic as possible. These are policy questions that lie outside the scope of this study, but statutes that incorporate either of these factors in calculating fees for copies should define commercial value and commercial use so as to leave as little discretion as possible to the records custodians.

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[109] The Campus Computing service at the University of Missouri-Columbia charges $1.50 an hour for copying computer tapes. *See* Braden *supra* note 5, at 12.

Other rules that raise the cost of access to information are the lack of an obligation to mail copies of records, limitations on the right to receive copies, and fees for inspection of or access to records. Each of these rules exists in only a minority of states, but those states should be encouraged to abolish these provisions. Those states that say agencies are not obliged to mail copies of records are imposing a hidden fee on access. Persons who live great distances from where the records are kept or who are elderly or otherwise unable to travel can obtain the information, if at all, only at a greater cost in time and money. The Vermont rule that the right to make a copy does not imply the right to receive a copy also raises the cost of access. If the only way of getting a copy of a record is by hand-copying it, then the price of access in terms of time has been increased. Charges for inspecting or having access to information also may increase the price of copies.

Most examinations of state open records laws have dismissed the issue of fees for copies with the observation that they are supposed to be reasonable or limited to the actual, direct, or necessary costs. The issue is much more complex. Although no one state law uses all of the mechanisms for restricting access, collectively, the state laws display an array of mechanisms for keeping the price of access high and government information out of the hands of citizens.

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IS YOUR BOSS READING YOUR E-MAIL?

PRIVACY LAW IN THE AGE OF THE "ELECTRONIC SWEATSHOP"

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Abstract

IS YOUR BOSS READING YOUR E-MAIL?

PRIVACY LAW IN THE AGE OF THE "ELECTRONIC SWEATSHOP"

Do employers have the right to look at an employee's E-mail messages? Do employees have a right to privacy that bars corporate snooping? This paper addresses this new workplace privacy issue and examines the legality of employee E-mail monitoring. Federal and state constitutional provisions, statutory law, and common law are examined, with the law found to primarily favor the employer. Bills pending in Congress are discussed, and suggestions for balancing interests are offered.

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IS YOUR BOSS READING YOUR E-MAIL?

PRIVACY LAW IN THE AGE OF THE "ELECTRONIC SWEATSHOP"

Employee privacy is considered to be the most significant workplace issue facing companies today.[1] A recent survey of American businesses by MacWorld magazine suggests that some 20 million Americans may be subject to some type of electronic monitoring through their computers on the job.[2] Employer access to what employees thought were private electronic mail (E-mail) files is especially raising eyebrows. The same study reveals that of those companies that engage in electronic monitoring practices, over 40 percent have searched employee E-mail files.[3] This is particularly troubling when less than one-third of all admitted electronic surveillers say they ever warn employees,[4] and only 18 percent of companies even have a written policy on electronic monitoring.[5]

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[1] At the American Civil Liberties Union, violations of privacy at the workplace have become the largest category among its 50,000 complaints received each year. Peter Blackman & Barbara Franklin, *Blocking Big Brother; Proposed Law Limits Employers' Right to Snoop*, N.Y. L.J., Aug. 19, 1993, at 5.

[2] Charles Piller, *Bosses With X-Ray Eyes*, MACWORLD, July 1993, at 188, 120. MacWorld conducted a survey of 301 businesses about employee monitoring. More than 21 percent of the respondents indicated that they have searched computer files, voice mail, E-mail, or other networking communications. For companies of more than 1,000 employees, that figure rises to 30 percent.

[3] *Id.* at 123. An informal survey of top Silicon Valley companies by the San Jose Mercury News also found a majority retain the right to review E-mail, and no company said it would not read other people's E-mail. *E-mail Snoopers No Secret*, REC., April 21, 1994, at DO2.

[4] *Id.* at 122.

[5] *Id.* at 120.

E-mail is considered to be the fastest growing form of electronic communication in the workplace, but the laws addressing employee privacy rights with respect to E-mail are unclear. Little research has been done on the legality of E-mail monitoring. Do employers have the right to look at an employee's E-mail messages? Do employees have a right to privacy that bars corporate snooping?

This paper examines the privacy debate and the legality of E-mail monitoring in the workplace. Several bills are now pending in Congress that are intended to either limit employer access[6] or permit workplace monitoring.[7] This paper examines the existing federal and state constitutional provisions, statutory law, and the common law as they currently pertain to employee privacy rights and E-mail. It then examines the proposed federal legislation and suggests some guidelines for balancing employee privacy and corporate monitoring needs.

I. E-MAIL MONITORING

With an estimated 40 million E-mail users expected to be sending 60 billion messages by the year 2,000, it is no wonder that corporate America is closely watching to see how the courts and Congress will handle the E-mail monitoring issues.[8] Electronic mail has become an indispensable tool that has revolutionized the workplace. More workers are able to communicate everything from simple memos to complex business plans to colleagues and clients across the hall or around the world in a matter of seconds. Companies and employees alike recognize the benefits of a technology that has the power to speed communication and improve productivity and efficiency.[9] At a time of fierce international competition, few employers can afford to pass up any opportunities E-mail provides.

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[6] S. 984, 103d Cong., 1st Sess., 139 CONG. REC. S6122 (1993); and H.R. 1900, 103d Cong., 1st Sess., 139 CONG. REC. E1077 (1993).

[7] S. 311, 103d Cong., 1st Sess., 139 CONG. REC. S1390 (1993).

[8] Scott Dean, *E-Mail Forces Companies to Grapple With Privacy Issues*, CORP. LEGAL TIMES, Sept. 1993, at 11. Corporate E-mail has grown 83 percent among the Fortune 2000 firms between 1991 and 1993, and nine out of ten locations employing over 1,000 workers in the U.S. now uses E-mail. John Thackery, *Electronic-Mail Boxes a Dumping Ground for Meaningless Data*, OTTAWA CITIZEN, May 28, 1994, at B4 (citing projections by the Electronic Messaging Association).

Yet the accessibility of corporate-owned electronic mail systems also presents a compelling new opportunity for company executives to "sneak a peak" at intracompany and intercompany communications in order to monitor employees and maintain control over the workplace. E-mail messages can easily be intercepted and read by not only system managers and operators, but by anyone with a working knowledge of and access to the corporate network.[10] In some cases, corporate executives may simply "ask" network administrators to present them with an employee's E-mail files.[11] In general, administrators will often monitor the message traffic and store E-mail as a permanent electronic record--and in some cases make and store printed copies.[12] Of course, messages are also vulnerable if employees are not given passwords to log into their mail, simply stay logged-in when they are away from their computers, or inadvertently route their messages to unintended recipients.[13] While some encryption technology is available or being developed for E-mail systems,[14] few companies may use it because of cost and efficiency factors.[15] Some type of E-mail security is desperately needed.[16]

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[9] For example, E-mail can be used to enhance a company's effectiveness by facilitating the flow of communications among employees at all levels, reducing "telephone tag," and resulting in a cost savings from reduced paper and postage usage. James J. Cappel, *Closing the E-mail Privacy Gap; Employer Monitoring of Employee E-mail*, J. SYS. MGMT., Dec. 1993, at 6. E-mail also allows users to send messages any day (i.e., on weekends) and at any time of day (i.e., at 2 a.m.), does not require the simultaneous presence of the recipient, and allows messages to be sent to more than one recipient at a time.

[10] *See* Pillar, *supra* note 2. MacWorld examined some E-mail products for their ability to be invaded.

[11] Doug vanKirk, *IS Managers Balance Privacy Rights and Risks; Proactive Companies are Establishing Clear Guidelines and Informing Employees*, INFOWORLD, Nov. 29, 1993, at 65.

Some employees are already finding this out the hard way. In what is believed to be the first publicly known E-mail case from 1990, an E-mail administrator for Epson America, Inc., discovered a supervisor reading all employee E-mail originating from outside the company. Alana Shoars had been told to reassure some 700 Epson employees that their E-mail would be private. When she complained about the monitoring, she was fired.[17] In another case, two system administrators of the California-based Nissan subsidiary's E-mail network were fired after filing a grievance alleging that their privacy had been invaded when their boss read their E-mail and had subsequently fired them.[18] Perhaps the most notorious case of E-mail insecurity involved Oliver North and John Poindexter who were communicating through E-mail in the system at the National Security Council. Although they thought they had sufficiently deleted their messages, back-up tapes had been made and were allowed as evidence for use by prosecutors in the Iran-Contra investigation.[19] A more recent civil suit that is still pending may have serious implications for anyone who uses E-mail at work. In 1992, a former Borland International Vice President defected to a rival computer software maker, but not before allegedly forwarding trade secrets via

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[12] This is what happened in 1990 when the Mayor of Colorado Springs, Colorado, admitted he had been reading the electronic mail that city council members had sent to one another. An E-mail policy had required that messages be printed periodically and be deleted to save space on the city computer. The printouts were kept in case any messages were deemed covered by the state's public-records law. Don J. DeBenedictis, *E-Mail Snoops*, A.B.A. J., Sept. 1990, at 26.

[13] The ease of replying to E-mail messages and sending messages to many people on a "whim" (as compared to sending ordinary letters) can also exacerbate the monitoring problem in terms of what may be communicated and regrettably read. A notorious example is that of Officer Lawrence Powell who, after the beating of Rodney King, broadcast an E-mail message over the Los Angeles Police Department system saying, "Oops, I haven't beaten anyone so bad in a long time." John K. Keitt, Jr. & Cynthia L. Kahn, *Cyberspace Snooping*, LEGAL TIMES, May 2, 1994, at 24.

[14] *See, e.g.*, Reuven M. Lerner, *Protecting E-mail*, TECH. REV., Sept. 1992, at 11, which discusses the use of public-key cryptosystems which grant the receiver of any E-mail sole access to its contents. *See also* Stephen T. Kent, *Internet Privacy Enhanced Mail: Development of Security Standards for Internet Computer Network*, COMM. ACM, Aug. 1993, at 48.

[15] Dean, *supra* note 8.

[16] E-mail security technology is lagging behind, yet software makers are reportedly hesitant to develop encryption programs because the Clinton administration may soon require them to use "backdoors"--i.e., with the "Clipper Chip"--that would allow authorized federal agencies like the F.B.I. to break the code and retrieve messages. (*See, e.g.*, Winn Schwartau, *Crypto Policy and Business Privacy: The Clinton Administration's Proposed Clipper Chip Workplace Privacy*, PC WEEK, June 28, 1993, at 207.)

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[17] Lynn Schwebach, *Reconciling Electronic Privacy Rights in the Workplace*, PCTODAY, Jan. 1992, at 38; Nicole Casarez, *Electronic Mail and Employee Relations: Why Privacy Must Be Considered*, PUB. REL. Q., Summer 1992, at 37; Bureau of National Affairs, Inc., *Electronic Mail Raises Issues About Privacy, Experts Say*, Daily Lab. Rep., Nov. 17, 1992, at A-7; and Piller, *supra* note 2. She sued and a class action suit followed, but both cases were thrown out. Appeals are pending. *See infra* note 154.

[18] Dean, *supra* note 8. Their E-mail had included jokes, racy personal messages, and criticism of the boss. *See infra* note 154.

[19] Alice Kahn, *Electronic Eavesdropping*, SAN FRANCISCO CHRONICLE, Oct. 31, 1991, at D3. In January 1993, a U.S. District Court Judge for the District of Columbia ruled that the tapes are official records and cannot be destroyed. Dean, *supra* note 8, and Keitt, Jr. & Kahn, *supra* note 13. This case, however, involved government communications which are subject to a different legal analysis. *See infra* p. 10.

Borland's MCI Mail. Borland executives obtained his password and discovered the messages which it intended to use as evidence against the former employee.[20] However, because MCI Mail was used as opposed to an intracompany E-mail system, a different legal analysis may come into play.[21]

The Debate

Legislation now before Congress addresses some of the issues of electronic monitoring in the workplace, including E-mail,[22] but not everyone is backing the measures. Proponents of stricter controls, including union leaders and advocacy groups, argue that without some reasonable controls, the nation runs the risk of turning workplaces into what are being coined as "electronic sweatshops"--where constant monitoring freely occurs.[23] Yet virtually every business lobbying group in Washington is lining up against proposed legislation that would curtail their ability to monitor the workplace.

Historically, employers have always monitored their workers' performance--observing production lines, counting sales orders, and simply looking over an employee's shoulder. Encroachment on employee privacy has strong traditions, from the advent of the industrial age and production line monitoring on through to employee psychological testing and more recently drug screening. But today the product of more businesses is service and information, which requires a different type of monitoring approach. Plus, new technologies have ushered in more ways to overhear, watch, or read just about anything in the workplace[24]--including E-mail.

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[20] Dean, *supra* note 8. In a similar case, two computer programmers who worked for a software company in San Jose, California, called Mentor Graphics, were fired for allegedly disclosing trade secrets to a rival computer company. The disclosure was discovered while monitoring E-mail messages sent over Internet. The case was settled in early 1992. Bureau of National Affairs, Inc., *supra* note 17.

[21] Pillar, *supra* note 2, at 122; Dean, *supra* note 8. *See infra* note 68 and accompanying text.

[22] S. 984, 103d Cong., 1st Sess., 139 CONG. REC. S6122 (1993); H.R. 1900, 103d Cong., 1st Sess., 139 CONG. REC. E1077 (1993); and S. 311, 103d Cong., 1st Sess., 139 CONG. REC. S1390 (1993).

[23] Lini Kadaba, *Employer Eavesdropping Debated: Workers Say it Stresses Them Out; Companies Content They Have Right*, PHOENIX GAZETTE, Oct. 8, 1993, at C6, and Bruce Phillips, *Uncontrolled Employee Monitoring Raises Threat of Electronic Sweatshops*, OTTAWA CITIZEN, Sept. 1, 1993, at A11.

There are concerns that these new forms of monitoring are diminishing the privacy rights of millions of workers, and it is feared that the workplace monitoring problem will only be exacerbated by even newer technologies being developed. Proponents of legislation to limit electronic monitoring argue that the need for employee privacy protection is now. They point to the recent MacWorld survey[25] and other studies[26] that reveal an alarming amount of electronic surveillance of workers--much of it done surreptitiously. They argue that employees are entitled to human dignity and should not have to leave their right of privacy behind them when they go through the office door. Moreover, people should be able to assume their mail is private, whether they are sending it via the Postal Service or an electronic method. There are fears of abuse by employers reading E-mail for nonlegitimate reasons such as voyeurism and paranoia. In addition, studies[27] show that employee surveillance in general takes its toll on workers and companies in terms of stress, fatigue, apprehension, motivation, morale, and trust, resulting in increased absenteeism, turnover, poorer management, and lower productivity,[28] not to mention higher health-care costs.

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[24] For example, electronic cards and "Active Badges" can reveal a worker's presence and location, call accounting systems can show how many calls and faxes were made and to whom, and computer programs can record when and how long an employee was logged onto a computer. *See, e.g.*, Phillips, *supra* note 23; Larry Tye & Marla Van Schuyver, *Technology Tests Privacy in the Workplace: No Private Lives*, BOSTON GLOBE, Sept. 6, 1993, at 13; and Blackman & Franklin, *supra* note 1.

[25] Pillar, *supra* note 2.

[26] For example, a 1991 study by the Society for Human Resource Management of its members found that eleven percent of the 1,493 respondents used video cameras to monitor workers; eight percent, computer terminal; and five percent, telephone taps. Kadaba, *supra* note 23. In 1990, a study of 186 New York metropolitan area companies found 73--roughly 40 percent--were engaging in some type of electronic surveillance of their employees. Gene Bylinsky, *How Companies Spy on Employees*, FORTUNE, Nov. 4, 1991, at 131. On the other hand, a study by Robert Half International, Inc., revealed that only 44 percent of companies surveyed had a written code of ethics communicated to employees. Schwebach, *supra* note 17. Employees also seem to be naive about company monitoring practices. A Louis Harris Associates Survey of

On the other hand, the corporate world[29] argues that they need to

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1000 workers at 300 companies found more than 90 percent think that employers collect only information that is relevant and necessary. Lee Smith, *What the Boss Knows About You*, FORTUNE, Aug. 9, 1993, at 88.

[27] These studies include one conducted by the University of Wisconsin that revealed that monitored telecommunications workers suffered more from depression, anxiety, and fatigue than nonmonitored workers at the same plant. A Massachusetts survey showed that at companies monitoring for efficiency, 65 percent of employees could not perform their tasks effectively because they were required to work too fast. Blackman and Franklin, *supra* note 1.

[28] For a related discussion, *see* Ernest Kallman, *Electronic Monitoring of Employees: Issues & Guidelines*, J. SYS. MGMT., June 1993, at 17.

[29] Trade associations and others are taking different stances on the debate. The ACLU's Task Force on Civil Liberties in the Workplace takes the position that companies should not open employee E-mail, although other organizations are also amenable to the corporate view. The Computer Professionals for Social Responsibility (CPSR), which in fact lobbied Congress to specifically include E-mail in its proposed legislation, says that companies should give individuals more privacy, but that company policies could spell out monitoring practices. The Electronic Frontier Foundation in Washington comes down on the side of privacy but agrees that if a monitoring policy is presented to employees, that employees are effectively giving the company permission to monitor

reserve the right to electronically monitor job performance and work-related activities in order to investigate and prevent theft, fraud, insider trading, drug dealing, and other illegal conduct, as well as to assure productivity, efficiency, and quality control.[30] Employers use monitoring for such purposes as evaluating employees and ensuring that customer and client relations are handled properly.[31] Critics of legislation restricting employer access argue that what takes place on company premises over company phones and E-mail networks belongs to the company which has a right to access the work product for which it is paying. They contend that employers have a legitimate right to a fair day's work and to be able to ensure that work is accomplished by being able to keep track of personal use of company equipment and other abuse.

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their E-mail. On the other hand, the Computer and Business Equipment Manufacturers Association considers computer monitoring to be a legitimate management tool, and the Electronic Mail Association (EMA), which represents E-mail suppliers and corporate users, agrees. While company policies spelling out privacy are good, EMA Executive Director William Moroney thinks that "employers need the right to control, evaluate, and monitor all forms of employee communication." The EMA essentially believes that employees should not expect any more of a right of privacy with E-mail than they would get from tossing a memo in their out-basket. Richard A. Danca, *Privacy Act Would Force Firms to Inform Their Employees About E-Mail Monitoring: Privacy Issue Comes of Age in the Networked World*, PC WEEK, June 28, 1993, at 203.

[30] According to the MacWorld survey, nearly half of the managers surveyed endorse the concept of electronic monitoring. Four percent endorse it "for routinely verifying employee honesty." A much higher number--23 percent--feel electronic monitoring is a good tool where reasonable evidence of wrongdoing, such as theft or negligence, comes to light. Pillar, *supra* note 2, at 121.

[31] Terry Morehead Dworkin, *Protecting Private Employees From Enhanced Monitoring: Legislative Approaches*, 28 AM. BUS. L.J. 59 (Spring 1990). A study by Ernest Kallman found several specific arguments for employing electronic monitoring in general. The primary argument put forth by management is to increase productivity. The second argument is that electronic monitoring allows management to do a better job of personnel management since it provides a more objective appraisal. Finally, it improves the performance appraisal process. Kallman, *supra* note 28.

Warning employees of when they will be monitored defeats the purpose. Moreover, they argue that limiting access would mean that employers might not be able to access an employee's E-mail in emergency situations.[32]

Unless adequate legislation is passed, workers subjected to E-mail searches will have to turn to the existing laws for possible recourse. These laws are virtually untested as they pertain to employee E-mail and privacy rights. The following sections explore what federal and state constitutional and statutory provisions might apply to employee E-mail monitoring and examine the existing tort law remedies.

II. E-MAIL PRIVACY RIGHTS UNDER THE CONSTITUTION

The U.S. Constitution

An examination of the highest source of law reveals that constitutional privacy rights,[33] as they might pertain to employees, are very limited in scope. The Fourth Amendment to the U.S. Constitution provides that the "right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ."[34] Most states also have a similar constitutional provision that provides similar protection. Yet the U.S. Constitution

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[32] For example, there are concerns that if a newspaper was working on a major story that relied on some key information stuck in a reporter's E-mail, the newspaper would not be able to access the information if the reporter was not available to give permission. Likewise, if a purchase order was sent via E-mail to a specific recipient who was unavailable, no one else in that office would be able to access the file to process the order. Bob Brown, *E-Mail Users Voice Concern About Pending Legislation*, NETWORK WORLD, Aug. 23, 1993, at 6.

[33] A right of privacy is not explicitly stated in the U.S. Constitution, although it has an implicit textual basis found in several amendments such as the Fourth Amendment.

[34] U.S. CONST. amend. IV.

(and most state constitutions[35]) only prohibit searches and seizures by the government and not by the private sector.[36] Thus in an employment context, only government employees may claim a constitutional privacy right should their E-mail be accessed; nongovernment employees have no constitutional guarantee of privacy in the workplace, unless infringed by a government search or seizure.[37]

While privacy protection afforded to public employees is beyond the scope of this paper, it is nonetheless instructive to briefly examine and compare the scope of these rights and the analysis used. For government employees (or employees subject to E-mail searches by the government) these rights are limited and may not be upheld. So far no case law specifically addresses a constitutional right of privacy related to E-mail, so courts may rely on precedents associated with similar types of electronic surveillance--such as the monitoring or recording of telephone communications. Here, the U.S. Supreme Court and lower courts have generally ruled in favor of the government "infringers."

In the landmark privacy case *Katz v. U.S.*,[38] and the subsequent case *Smith v. Maryland*,[39] the Supreme Court upheld the actions of government agencies that engaged in a type of telephone monitoring without warrants.[40] The High Court relied on a two-part test it had developed that essentially determines whether the plaintiff exhibited a reasonable "expectation of privacy."[41] Whether an "expectation of privacy" exists (and thus whether a plaintiff's suit might be successful) depends on a number of factors such as the private nature of the information involved and whether the individual had "knowingly exposed" the information.[42] In *Smith*, the Court determined that the plaintiff had no expectation of privacy when a pen register employed by a telephone company at police request had recorded the telephone numbers he had dialed from his home. The Court stated that "[a]ll subscribers realize . . . that the phone company has facilities for making permanent records of the numbers they dial . . . ."[43] The Court also concluded that an expectation of privacy in this case would not be reasonable because Smith had "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."[44]

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[35] *See* infra p. 15.

[36] The Search and Seizure clause of the U.S. Constitution does not protect citizens from unreasonable searches by private parties. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974), and United States v. Jacobsen, 466 U.S. 109, 113-14 (1984).

[37] In this sense, one might observe that private employees actually enjoy less privacy protection than those working for the government.

[38] 389 U.S. 347 (1967).

[39] 442 U.S. 735 (1979).

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[40] In *Katz*, F.B.I. agents acting without a warrant attached a listening device to the outside of a public phone booth to monitor the defendant's conversation. In *Smith*, a telephone company used a pen register at police request to record the numbers dialed from the home of a man suspected of placing threatening calls to a robbery victim.

[41] This standard was first enunciated in *Katz* and later adopted in *Smith*. It first asks whether the individual, by his or her conduct, has "exhibited an actual (subjective) expectation of privacy," (339 U.S. 347, 361 (Harlan, J., concurring)) having shown that he or she "seeks to preserve (something) as private." (at 351) The second part of the analysis is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" (at 361) Most adjudication has relied on the second part of the inquiry, which remains the prevailing authority. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[42] Other criteria include whether there was a legitimate purpose or "compelling government interest" in the seizure/disclosure of the information; what alternatives were available; whether a property right could be maintained; and what precautions were taken. For an analysis of these criteria, *see* Laurie Thomas Lee, *Constitutional and Common Law Informational Privacy: Propcsing a "Reasonable Needs" Approach for New Technologies*, Paper Presented to the AEJMC Annual Convention, Kansas City (Aug. 1993).

Applying the Smith standard to E-mail suggests that an employee's privacy interest in E-mail messages would likewise fail the "expectation of privacy" test since most users probably realize that a system administrator could have access to their E-mail accounts. Although most users assume that the administrator will not examine their mail,[45] they have nonetheless "voluntarily conveyed" the information. Moreover, if government employers have a publicized policy on this type of electronic monitoring, then the employee has generally assumed the risk that his or her messages will be searched. In fact, courts have recently held that a publicized monitoring policy reduces an employee's expectation of privacy as to the contents of his desk[46] or locker.[47] It should also be noted that private sector employees would likewise fail the expectation of privacy test and be vulnerable to E-mail searches by the government. Moreover, if the government (i.e., the police, F.B.I., etc.) is voluntarily offered the contents of any public or private sector employee's E-mail file by a third party (i.e., a co-worker), then a constitutional right is not invoked.[48]

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[43] 442 U.S. 735, 742.

[44] *Id.* at 743-44. The Court has also relied on the "knowingly exposed" criterion in *United States v. Knotts*, 460 U.S. 276 (1983) (where a "beeper" had been attached to an individual's car for tracking purposes, and an automobile otherwise travels over publicly viewed roads), and in *California v. Ciraolo*, 476 U.S. 207 (1986) (where a homeowner complained of the government flying over, observing, and photographing his fenced-in backyard, otherwise observable from overhead).

[45] This is because of the large volume of messages being transmitted over the system and a perception that an E-mail administrator or operator would otherwise be disinterested. This assumption is probably valid, although telephone companies, too, have little interest in any one phone call of thousands, although some interceptions do still occur for various reasons.

[46] Schowengerdt v. United States, 944 F.2d 483, 488-89 (9th Cir. 1991), *cert. denied*, 117 S.Ct.L.Ed.2d 650 (1992).

Even if the courts find a reasonable expectation of privacy in electronic mail, then the reasonableness of a particular search or seizure would then be analyzed. This analysis requires a balancing of the nature of the intrusion against the importance of the government interests justifying the intrusion. In one of the few cases where the Supreme Court has considered public employees' privacy interests, the High Court found that a public employee has a reasonable expectation of privacy in his office desk and file cabinets.[49] In fact, the Court noted that "not everything that passes through the confines of the business

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[47] American Postal Workers Union v. United States Postal Serv, 871 F.2d 556, 560 (6th Cir. 1989).

[48] A recent E-mail snooping allegation may serve as an example here. At the University of Nebraska at Omaha, computer administrators allegedly read student E-mail messages without their permission, but supposedly to help law enforcement authorities. In one case, computer files of one student were turned over to police pursuing a felony investigation. *See E-mail Snooping Alleged; UNO Administrators May Have Eavesdropped*, LINCOLN J., Mar. 30, 1994. If the administrators voluntarily released the contents to the authorities on their own initiative (or a warrant had been properly issued), then a constitutional right would not likely be found. *See, e.g.*, "false friend" cases such as Hoffa v. United States, 385 U.S. 293 (1966); United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963); and Couch v. U.S., 409 U.S. 322 (1973). *See also* United States v. Miller, 425 U.S. 435 (1976), and California v. Greenwood, 486 U.S. 35 (1988).

[49] O'Connor v. Ortega, 480 U.S. 709 (1987).

address can be considered part of the workplace context."[50] But the Court also noted that the reasonableness of a "search" requires balancing the privacy interest against the government's need for supervision, control, and efficiency as an employer. A government search may be considered reasonable if there are reasonable grounds for suspecting that the search will reveal worker misconduct, and the search was limited to accomplishing the underlying objectives. Thus, a decision rendered in a case involving E-mail may turn on an assessment of the reasonableness of the search and a balancing of the interests and needs. In general, courts have tended to find that an employer's needs outweigh the employee's privacy interest, and in subsequent employee search cases, the High Court has found the government's interest to prevail.[51] Thus in applying the same criteria and balancing test to E-mail, the courts may find no constitutional privacy rights infringed.

State Constitutions

Like the U.S. Constitution, most state constitutions will only protect privacy rights belonging to government employees or others subject to government monitoring.[52] While most states contain provisions similar to the Fourth Amendment, a few state constitutions do recognize an explicit right to privacy. (*See* Table 1) However, only one state, California, has generally provided a constitutional privacy right that can be invoked by employees subject to private sector searches. Still, New Jersey recently recognized a state constitutional right of privacy[53] which may be applied to the private sector workplace.[54] Moreover, the Alaska Supreme Court, while finding that its respective constitutional privacy provision does not apply to private actors, nonetheless recently noted that its constitutional provision might form the basis for a "public policy supporting privacy."[55] Thus, a trend toward more constitutional privacy protections for private sector employees may be emerging.

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[50] *Id.*

[51] In one case, the Court concluded that suspicionless drug testing of railroad employees was reasonable in the interest of railroad safety. Skinner v. Railway Labor Executive's Association, 489 U.S. 602, 109 S. Ct. 1402 (1989). In another case, the Court upheld a drug screen program for U.S. Customs Service employees involved in such activities as drug interdiction. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989).

[52] *See, e.g.*, Bianco v. American Broadcasting Cos., 470 F. Supp. (N.D. Ill. 1979), where an employer's electronic eavesdropping on employees did not violate an Illinois constitutional provision prohibiting interceptions by eavesdropping devices, since the constitutional provision limits only governmental activity and not private activities.

In California, the courts have held that the right to privacy in the state constitution applies with equal force to those in both the private and public sector.[56] The courts have generally held that the state constitution prohibits all incursions into individual privacy unless justified by a "compelling interest." As with the Supreme Court, there is no clear answer as to how a California court will decide an E-mail privacy claim without first knowing the employer's justification for the search. It should also be noted that California law does not extend to California companies and employees if the search or seizure by the employer occurs out of state. It will be instructive, however, to analyze the state's reactions to the few E-mail privacy cases which are still pending--since all of these cases happen to reside in California.[57]

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[53] N.J.S.A. CONST. art. 1, par. 1. This states that "[A]ll persons are by nature free and independent and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

[54] Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81 (1992). In this case, the Supreme Court of New Jersey nonetheless upheld an employer's discharge of an employee following a positive drug test.

[55] Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1132-33 (Alaska 1989). It also found that public policy entitled private employers to withhold private information from their employers. *Id.* at 1131-33.

[56] *See, e.g.*, Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (where a private university improperly disclosed a student's grades from another university to the State Scholarship and Loan Commission). *See also* Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 55 (1975) (where similarly, a private entity was prevented from disclosing another entity's financial records).

III. FEDERAL AND STATE STATUTORY LAW--E-MAIL WIRETAPPING

Federal Statutes

Both private and public employees may turn to current federal and state statutory law to contest an employer's "right" to E-mail monitoring, but may again find little relief. The key federal law to date in this area is the Electronic Communications Privacy Act of 1986 (ECPA),[58] which bars the interception of electronic communications. The Act would seem to protect workers from many types of electronic monitoring including E-mail interceptions, but it is not explicit when it comes to the workplace, and it contains some exceptions that courts may determine exclude employee protection.

Congress adopted the ECPA in 1986 as an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[59] commonly known as the federal wiretapping statute. The intention was to update the law's language to encompass new technologies and to expand its scope[60] to include the interception of electronic communications and stored electronic communications, such as between computers or between a computer and a human.[61] In fact, the ECPA was also intended to include coverage of private communication systems such as intracompany networks.[62]

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[57] *See supra* p. 4 and *infra* notes 154 and 20, 156.

[58] Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2521, 2701-2710, 3117, 3121-3126 (1988)).

[59] 18 U.S.C.A. §§ 2510-2520 (1970 & Supp. 1994).

The ECPA does not directly mention electronic mail, but it is included within the scope of the Act's general protections. The ECPA forbids, for example, the interception of electronic communications, which, according to the legislative history, includes electronic mail.[63] The Act further defines an "electronic communication service" as one that provides to users the "ability to send or receive wire or electronic communications,"[64] which is intended to include electronic mail companies.[65] The ECPA also comprises the Stored Wire and Electronic Communications and Transactional Records Access Act,[66] which establishes broad prohibitions on accessing and disclosing electronically-stored communications.[67]

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[60] Congress believed the ECPA was necessary because the 1968 Act initially protected only against aural interception of voice communications, and the privacy protection was limited to narrowly defined "wire" and "oral" communications. It did not cover data communications. *See* U.S. v. Gregg, 629 F. Supp. 958 (W.D. Mo. 1986), *aff'd*, 829 F.2d 1430 (one case that prompted the ECPA amendments because Title III, which regulated the "interception of wire and oral communications," did not apply to the interception of telex communications; telex interceptions did not involve "aural acquisition" of defendant's communications.)

[61] 18 U.S.C. §§ 2510(1), (4), (12), (17).

[62] Senate Report No. 99-541, U.S.C.C.A.N. 3555, 3566 (1986).

[63] *Id.* at 3568. The ECPA defines electronic communications as the "transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . . ." (18 U.S.C. §2510(12)) The legislative history further clarifies that the term "also includes electronic mail, digitized transmissions, and video teleconferences." (Senate Report, at 3568)

The ECPA has several exceptions, however, that may limit its protection of employee E-mail:

1. Interstate Systems

In the first place, the ECPA may only protect messages sent over public networks such as MCI Mail, Internet, Prodigy, or CompuServe. This is because the definition of "electronic communications" under the statute only pertains to such communication that "affects interstate or foreign commerce."[68] Internal E-mail systems may not be covered by the Act. Although Congress did intend for the Act to include intracompany networks, it confined this broader coverage to "wire communication," and Congress has specified that "wire communication" includes some element of the human voice.[69] Thus, a company PBX (and hence voice mail) may be covered, but not an intracompany E-mail system--unless that system crosses state lines or perhaps connects to an interstate network. The Act is not at all clear on this point, however, and thus court interpretation will be needed.

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[64] 18 U.S.C. § 2510(5).

[65] Senate Report, at 3568.

[66] 18 U.S.C. §§ 2701-2711.

[67] *Id.* § 2701. This provision makes it unlawful for anyone who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents unauthorized access to a wire or electronic communication while it is in electronic storage in such system . . . ." The Act does not specifically state that electronic storage pertains to E-mail, but this provision would still protect E-mail provided as an "electronic communication service."

[68] 18 U.S.C. § 2510(12).

2. Prior Consent Exception

The Act also allows the interception of electronic communications where "one of the parties to the communication has given prior consent."[70] Unless other parties with whom an employee is communicating allow the employer access to the messages, then the employee would appear protected--assuming he or she did not give consent. But the analysis may then turn on whether or not some aspect of the employer-employee relationship might be construed to suggest that implied consent was given. Courts have found that consent may be inferred from "surrounding circumstances indicating that the [parties] agreed to the surveillance."[71]

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[69] Senate Report, at 3565-3566. This states that "the transmission of 'communications affecting interstate or foreign commerce,' are within the definition of a 'wire communication.' This language recognizes that private networks and intracompany communications systems are common today and brings them within the protection of the statute . . . . [T]he term 'wire communication' means the transfer of a communication which includes the human voice at some point." Congress considers voice mail to be an example of "wire communication." (at 3566) Congress does not explicitly include private networks and intracompany communications within its discussion of electronic communications. What is confusing about this distinction, however, is that the definition of "wire communication" in the Act "includes any electronic storage of such communication." (18 U.S.C. § 2510(1))

[70] 18 U.S.C. § 2511(2)(d) (unless the purpose of the interception is to commit a criminal or tortious act). The Stored Wire and Electronic Communications provisions also permit access to stored communications with the authorization "by the user of that service with respect to a communication of or intended for that user; . . ." § 2701(c)(2)

The courts do not construe the meaning of implied consent broadly, however. In *Watkins v. L.M. Berry & Co.*,[72] an appeals court determined that a telemarketing employee's knowledge of her employer's capability of monitoring her private telephone conversations could not be considered implied consent to such monitoring.[73] Yet the court in this case did find that Watkins had consented to a company policy of monitoring business calls that could include the unintentional interception of a personal call for a limited time.[74] The court stated that the prior consent exception (of then Title III) does not give employers carte blanche monitoring rights, but can be used to justify monitoring business calls including the momentary interception of a personal call until the personal nature is established.[75] Thus, monitoring of business communications and the inadvertent monitoring of personal communications could be allowed if an employer has a written policy addressing E-mail monitoring. In this case, employees using the system would be considered to have given implied consent.

Yet it should be noted that implied consent would not be found if the monitoring exceeded the terms of the company's policy.[76] In other words, if the monitoring policy was designed to survey only the extent of E-mail use in the company, for example, then uncovering a breach of trade secrets may be beyond the scope of implied consent. Moreover, implied consent would not be found if an employer only suggests to the employees that monitoring may be done. This was the case in a recent telephone case where, from a telephone extension, owners of a liquor store tape recorded conversations of an employee suspected in an unsolved burglary of the store. In *Deal v. Spears*,[77] Newell Spears advised his employee--who had been making numerous personal telephone calls--that he might be forced to monitor her calls if abuse of the store's telephone for personal calls continued.[78] The court held that the employee's consent was not implied because she was not informed that she was being monitored, only that "they might do so in order to cut down on personal calls."[79] Other courts also find no implied consent where defendants argue that a plaintiff simply "should have known" that he or she was being monitored.[80] Thus, the legality of E-mail monitoring under the prior consent exception may depend on the specificity and clarity of the company's monitoring policy.

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[71] Griggs-Ryan v. Smith 904 F.2d 112, 117 (1st Cir. 1990). The court further stated that "consent inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights." *Id.* at 116. This case was outside the employment context, although it concerned telephone monitoring.

[72] 704 F.2d 577 (11th Cir. 1983).

[73] *Id.* at 581.

[74] *Id.*

[75] *Id.* at 581-82.

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[76] This was the case in *Watkins*, where a personal call was more than inadvertently monitored. The court remanded the case to determine the scope of the consent and to decide whether and to what extent the interception exceeded the consent. *Id.* at 582.

[77] 980 F.2d 1153 (8th Cir. 1992).

[78] *Id.* at 1156-57.

[79] *Id.* at 1157.

[80] Campiti v. Walonis, 611 F.2d 387, 396 (1979) (where police officer used an extension phone to intercept inmates' telephone conversations).

3. Business Use Exemption

Perhaps more troubling for employees are provisions that--regardless of prior consent--might exclude from coverage certain types of interceptions made in the "ordinary course of business." There are two key provisions of the ECPA that address this type of exception. One provision has been relied on in telephone extension monitoring cases,[81] but may not pertain to E-mail monitoring unless telephone equipment or facilities are specifically involved. This provision essentially permits interceptions where telephone or telegraph equipment are used in the ordinary course of business.[82] Yet courts may not consider a network manager's modem, computer, or software program to be telephone or telegraph equipment, and the leasing of telephone lines may not necessarily qualify under this exemption. Even in telephone extension cases, the telephone equipment distinction has been construed narrowly.[83]

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[81] *See, e.g.*, Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412 (11th Cir. 1986); Watkins v. L.M. Berry & Co., 704 F.2d 577; and Deal v. Spears, 980 F.2d 1153.

[82] The ECPA finds interceptions of electronic communications to be unlawful if accomplished through the use of an "electronic, mechanical, or other device." 18 U.S.C. § 2510(4). But such devices do not include

> a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of a wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and is used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business . . . . (§ 2510(5)(a))

[83] For example, in Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412, the court, in determining the exceptions under § 2510, distinguished a "ringdown line" from an entire extension telephone, and distinguished recording equipment used from the intercepting dispatch panel. In Deal v. Spears, 908 F.2d 1153, 1158, the court distinguished the use of a telephone recording device purchased from Radio Shack to fall outside the exception since the device was not provided by a telephone company.

Still, employers may turn to another ECPA "business use" exception that does not specify the type of equipment, but rather allows certain interceptions by electronic communication service providers or their "agents." Section 2511(2)(a)(i) provides that

> [i]t shall not be unlawful under this chapter for an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . . . (18 U.S.C § 2511(2)(a)(i))

The term "provider" would likely include public E-mail networks, such as Prodigy and CompuServe, and the term "agent" may or may not be defined to include employers who subscribe to or use their E-mail service. Companies with their own E-mail systems on their own wide area (interstate) networks could also fall under this exception as electronic communication service providers.[84]

It is the second element of both ECPA provisions--the "business use" exception--which may then be interpreted to give employers fairly broad authority to intercept and monitor E-mail messages. Of course, the law would require employers and public E-mail providers to demonstrate that a particular interception was done in the ordinary course of business--such as the rendering of service maintenance. In fact, under section 2511(2)(a)(i), service providers or employers would need to prove that the monitoring was necessary to render service or to protect their rights or property. Still, the courts may find that this includes such reasons as the need to prevent abuses of the system such as computer crime, maintain the system, or detect personal use of the system if it is prohibited.[85]

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[84] One confusing aspect is that the service provider must be using facilities for the transmission of a wire communication, which by definition, may limit this to only providers that also transport voice communications. *See supra* note 69.

In cases involving telephone extension monitoring, the courts have been fairly liberal in their interpretation of the business use exception. In *James v. Newspaper Agency Corp.*,[86] the court held that a newspaper's telephone monitoring program of its telemarketing employees was squarely within the business (telephone) extension exemption because it was conducted for a "legitimate business purpose" designed to help employees deal with the public effectively. In *Briggs v. American Air Filter Co.*,[87] where a supervisor monitored a business call where an employee divulged trade secrets to a competitor, the court held that the monitoring was within the ordinary course of business.

Some courts have nonetheless limited the business use exemption according to the scope of the intrusion and the nature of the communication. For example, in *Watkins v. L.M. Berry & Co.*,[88] where the interception was of a personal call, the court followed *Briggs*, but said it would only allow the unintentional interception of a personal call and for only a limited time until the personal nature of the call is established.[89] In *Deal v. Spears*,[90] the court found that the employer had exceeded the scope of the exemption by having listened to all 22 hours of his employee's tape recorded personal calls. Even though the court agreed that the employer had a "legitimate business reason" for listening (i.e., employee's suspected burglary involvement and abuse of phone privileges), the court agreed with *Watkins* in concluding that the employer might have legitimately monitored the calls only to the extent necessary to determine that they were personal and in violation of store policy.[91]

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[85] Section 2511(2)(a)(i) does not further limit the extent of monitoring by electronic communication service providers. Instead, it states only that "a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks." (emphasis added)

[86] 591 F.2d 579 (10th Cir. 1979).

[87] 455 F. Supp. 179 (N.D. Ga. 1978), *aff'd*, 630 F.2d 414 (5th Cir. 1980).

[88] 704 F.2d 577.

Thus if the courts analogize E-mail interceptions to telephone extension monitoring, employers may be able to prove a legitimate business reason for the monitoring, provided that the monitoring does not include reading personal E-mail in its entirety. Of course, personal E-mail would still be vulnerable to some degree of observation, and unless the contents of the messages are divulged or clearly acted upon, it may be difficult to prove that intercepted personal messages were completely read. Even Congress acknowledges that computer monitoring may be more difficult to limit than telephone conversations.[92].

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[89] *Id.* at 581-82.

[90] 980 F.2d 1153.

[91] *Id.* at 1158. The court did, however, refuse to grant punitive damages, considering that the employee was warned, that the employer had a purpose to solve a crime, that the employer had asked a law enforcement officer in advance about the legality of recording, and that the tapes were only played to the employee. *Id.* at 1159.

[92] "It is impossible to 'listen' to a computer and determine when to stop listening and minimize as it is possible to do in listening to a telephone conversation." (Senate Report, at 3585) This would "require a somewhat different procedure than that used to minimize a telephone call." (at 3583)

In addition to the prohibitions on interception, it should also be noted that the ECPA further prohibits the intentional disclosure of the contents of an electronic communication obtained through an illegal interception.[93] This would include any information concerning the "substance, purport, or meaning" of the communication.[94] In *Deal v. Spears*, where one of the liquor store owners had disclosed only the general nature of the taped contents to the plaintiffs' spouses, the disclosure fell within the statute's purview.[95] Thus, if an employee is successful in showing that an E-mail interception was in violation of the Act, he or she may also then recover damages[96] if the employer showed or even discussed the contents of a message with others.

Finally, for government employees and employees subject to government interceptions of their E-mail, the ECPA does provide greater relief by requiring that a warrant be issued first.[97] If a warrant is issued, however, providers would be required to disclose the contents of an electronic communication in electronic storage. Not all personal communications beyond the application of the search warrant may be

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[93] 18 U.S.C. § 2511(1)(c). This attaches liability when a party "intentionally discloses . . . to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained" through an interception illegal under the Act.

[94] *Id.* § 2510(8).

[95] 980 F.2d at 1156, 1158

[96] Under any of these sections of the ECPA, a successful civil plaintiff may recover the greater of either A) actual damages plus any profits made by the violator, or B) the greater of $100 a day for each day of violation or $10,000. 18 U.S.C. § 2520(c)(2)(A), (B) Punitive damages, attorney fees, and other litigation costs reasonably incurred are also allowed. § 2520(b)(2), (3).

[97] 18 U.S.C. § 2703.

"seized" and read, however. This was recently tested in a March 1993 case where a judge ruled that Secret Service agents had indeed violated the ECPA when they read (and destroyed) additional stored electronic messages--including personal E-mail--on computers they had seized with a warrant.[98]

State Statutes

Most states also have statutes that limit the interception of electronic communications, and states are also free to enact laws that are more restrictive and thus provide even greater privacy protections than the federal law. Unless a conflict between the laws exists, the state law will prevail.[99]

Many states have laws that, in fact, incorporate the provisions of the ECPA, including the "prior consent" and "business use" exceptions. (*See* Table 2) Yet several states also require the prior consent of "all parties" (*see* Table 2), which could severely limit employee E-mail monitoring if the consent of the party with whom an employee is communicating must also give his or her consent.[100] Many states also only exempt communications common carriers under their business use exemptions, rather than "electronic communication service" providers.

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[98] The computers belonged to an individual suspected of a computer crime conspiracy to disrupt 911 systems. Steve Jackson Games, Inc. v. United States Secret Service, 816 F. Supp. 432 (W.D. Tex. 1993). The court held that the Secret Service had violated provisions of the Stored Wire and Electronic Communications and Transactional Records Access Act (of the ECPA), 18 U.S.C. §§ 2701-2711.

[99] Federal law does not pre-empt state law under the Supremacy Clause of the U.S. Constitution. *See, e.g.*, Ann K. Bradley, *An Employer's Perspective on Monitoring Telemarketing Calls: Invasion of Privacy or Legitimate Business Practice?*, 42 LAB. L.J. 259 (May 1991).

[100] Unless, of course, the other party is also an employee of the same company and "implied consent" is found.

(*See* Table 2) The term "common carrier" could arguably preclude from these exemptions any service providers such as Prodigy, CompuServe, and value-added carriers that are not identified and regulated as "common carriers."[101] In this sense, employees in a few states may find greater protection from monitoring under state law.[102]

Yet in other states there are no similar wiretap provisions that may protect employees,[103] and in one state--Nebraska--employers are specifically exempted under that state's wiretapping provision. Nebraska, which supports many telemarketing firms and has a fairly liberal telecommunications regulatory environment, permits "an employer on his, her, or its business premises . . . to intercept, disclose, or use" an electronic communication while "in the normal course of his, her, or its employment . . . ."[104] The law limits the monitoring, but does permit the monitoring for "performance control checks as long as reasonable notice of the policy of random monitoring is provided to their employees."[105]

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[101] A communications common carrier provides transmission service facilities to the general public--such as a telephone or telegraph company--and is regulated by federal and state regulatory agencies. *See, e.g.*, W. JOHN BLYTH & MARY M. BLYTH, TELECOMMUNICATIONS: CONCEPTS, DEVELOPMENTS, AND MANAGEMENT, at 45 (2d ed. 1990).

[102] It should be noted that while many states limit the business use exemption, employees may still lose protection where prior consent is found.

[103] *See* Table 2 for those states not listed or that do not clearly identify a business use exemption (Prior Consent Exemption Only).

[104] R.R.S. Neb. @ 86-702(2)(a) (1992). This specifically states:

> It shall not be unlawful . . . for an employer on his, her, or its business premises, for an operator of a switchboard, or for an officer, employee, or agent of any provider, the facilities of which are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his, her, or its employment while engaged in an activity which is a necessary incident to the rendition of his, her, or its service or to the protection of the rights or property of the carrier or provider of such communication services. Such employers and providers shall not utilize service observing or random monitoring except for mechanical, service quality, or performance control checks as long as reasonable notice of the policy of random monitoring is provided to their employees.

A few states have considered stricter laws that would specifically constrain the monitoring practices of private sector employees,[106] although many of these measures have generally been defeated by corporate lobbyists.[107] Texas proposed a law that did not pass which would have protected privacy by prohibiting secret electronic surveillance and unreasonable searches, and by preventing employers from obtaining unnecessary private information about employees.[108] California recently passed a law to specifically prohibit telephone corporations from monitoring or recording their employees' conversations, but the bill was vetoed by the Governor.[109] Other states have passed laws that restrict surveillance, but do not necessarily protect E-mail or computer files.[110]

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[105] *Id.*

[106] *See* Dworkin, *supra* note 31, at 80.

[107] Casarez, *supra* note 17, at 38.

[108] Tex. H.R. 889 (1989).

[109] 1993 CA A.B. 2271 (vetoed Oct. 11, 1993). The law would have prohibited "any officer, employee, or agent of a telephone corporation from monitoring, recording, wiretapping, eavesdropping, or otherwise documenting any conversation of its employees, except . . . a telephone corporation may monitor telephone conversations of its employees solely for the purposes of quality assurance and training."

[110] For example, Nevada passed a law that prohibits surreptitious monitoring of other people, but it is limited to private conversations. NEV. REV. STAT. ANN. § 200.650 (Michie 1991). Connecticut passed a law that prevents electronic surveillance of areas provided for the "health or personal comfort of employees or for the safeguarding of their possessions." CONN. GEN. STAT. ANN. § 31-48b(b) (West 1987). Although the state law does not specify E-mail, it is considered to apply to the surveillance of related areas such as lounges, locker rooms, and rest areas, and it does not consider prior notification as an exception.

One of the most comprehensive pieces of legislation currently being proposed is in Massachusetts. Earlier bills[111] did not pass or were struck down as being overly broad,[112] but a new bill has been introduced in 1994.[113] It essentially provides that employers may not electronically monitor employees without giving written notice about the monitoring, what data would be collected and how frequently, how the results would be used, and how work standards would be established through the monitoring. Georgia has also introduced legislation this year to provide restrictions on electronic monitoring by employers,[114] and New York introduced a bill that would prohibit employers from operating electronic monitoring and/or surveillance equipment for observing "non-work related activities."[115] No other bills addressing electronic monitoring are currently pending in any other state. Thus so far, private sector employees in most states may generally be left unprotected under state law.

IV. COMMON LAW AND E-MAIL INTRUSION

In the absence of clear statutory or constitutional rights to E-mail privacy, employees may be able to find relief in a common law cause of

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Dworkin, *supra* note 31, at 80.

[111] Such as 1991 MA H.B. 4457.

[112] Opinion of the Justices, 358 Mass. 827, 260 N.E. 740 (1970).

[113] 1994 MA H.B. 1800. As of June 1994, the bill had not passed the House.

[114] 1994 GA S.B. 646 (introduced Feb. 15, 1994).

[115] 1994 NY A.B. 10705 (introduced April 1, 1994). This may apply to personal E-mail messages if considered to be "non-work related activities."

action known generally as "invasion of privacy."[116] This common law cause of action has been fairly recently recognized by courts and legislative bodies as a means of protecting against unwarranted intrusions into one's affairs; essentially, one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. Some states recognize a common law right of privacy which may protect private employees.[117]

Of four generally recognized privacy torts,[118] the specific tort known as "intrusion into seclusion or private affairs" would be the most applicable to the interests of E-mail users. This provides that "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his or her private affairs or concerns, is subject to liability to the other for invasion of his or her privacy, if the intrusion would be highly offensive to a reasonable person."[119] This right of privacy would arguably include the right to be free from unreasonable intrusions by employer searches.[120]

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[116] Privacy law began as a common law tort that grew from a set of rights broadened to mean "the right to enjoy life--the right to be let alone." *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 192, 192 (1890).

[117] 2 G. TRUBOW, PRIVACY LAW AND PRACTICE 9-51 (1991).

[118] In 1960, Dean William L. Prosser synthesized hundreds of cases recognizing a right of privacy actionable in tort. (William L. Prosser, *Privacy*, 28 CALIF. L. REV. 383 (1960)) His widely accepted analysis (reflected in RESTATEMENT (SECOND) OF TORTS § 652B (1977)) breaks down the privacy invasion lawsuit into four separate torts: 1) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness, 2) Publicity which places a person in a false light in the public eye, 3) Public disclosure of embarrassing, private facts about the plaintiff, and 4) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

[119] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

Until 1979, however, few employees brought suits against their employers.[121] Since then, there has been a dramatic upsurge in privacy litigation.[122] In general, employee privacy suits under common law have concerned such matters as drug testing[123] and polygraph testing,[124] where the courts appear to be supportive of employers' attempts to create a safe working environment.[125] Other types of employee privacy suits have concerned the photographing of employees,[126] where courts have generally allowed employers to photograph their employees over the employees' objections when the employer has shown a legitimate purpose for taking the pictures.[127]

Although the courts do not specifically rule according to any list of criteria, several factors have evolved for use in determining a common law right against intrusion. Courts tend to consider 1) whether there was an intentional intrusion;[128] 2) the location and private nature of the activity involved;[129] 3) whether the intrusion was "highly offensive to the reasonable person;"[130] and 4) whether the infringer had a legitimate purpose warranting the intrusion.[131]

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[120] 2 G. TRUBOW, *supra* note 117, citing, e.g., Love v. Southern Bell Telephone and Telegraph Co., 263 So. 2d 460 (La. Ct. App.), *cert. denied*, 262 La. 1117, 266 So. 2d 429 (1972).

[121] *See* David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591 (1990).

[122] *Id.*

[123] *See, e.g.*, Luedtke v. Nabors Alaska Drilling Inc., P.2d 1123 (Alaska 1989) (where employer testing for drug use was found not actionable as an invasion of privacy because the intrusion was not unwarranted).

[124] *See, e.g.*, Ballaron v. Equitable Shipyards, Inc., 521 So. 2d 481 (La. Ct. App. 1988), *cert. denied*, 522 So. 2d 571 (La. 1988), and Gibson v. Hummel, 688 S.W.2d 4 (Mo. Ct. App. 1985) (where requiring a polygraph test did not constitute outrageous conduct where employee admitted to stealing during the test).

[125] 62A AM. JUR. 2D *Privacy* § 61 (1990).

[126] *See, e.g.*, Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962) (where employer may take motion pictures of employees without their consent for purposes of studies to increase efficiency and promote the safety of employees).

[127] 62A AM JUR 2d., *supra* note 125.

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[128] This would include surreptitious surveillance such as wiretapping or eavesdropping. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), *aff'g* 284 F. Supp. 925 (C.D. Cal. 1968). *See also* Marks v. Bell Telephone Co., 460 Pa. 73, 331 A.2d 424 (1975) (where, in the absence of an intentional overhearing of a private conversation by an unauthorized party, the tort of invasion of privacy was not committed).

[129] For example, courts have applied a different standard to privacy in the home and in similar quarters. *See, e.g.*, Newcomb Hotel v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921) (intrusions into guest rooms by hotel management), and Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (intrusions into overnight quarters on a train or ship by management). Yet if individuals are in a public place, there may be no cause of action. *See, e.g.*, Muratore v. M/S Scotia Prince, 656 F. Supp. 471 (D. Me. 1987) (photographing passenger in a public place). Even if the plaintiff is considered to be in a public place, however, some consideration is given to the private nature of the activity. For example, in Lewis v. Dayton Hudson Corp., 128 Mich. App. 165, 339 N.W.2d 857 (1983) the court considered the private nature of one's activity in a case involving the observations of a store patron trying on clothes in a dressing room--despite the fact that the activity occurred on store property. In general, that which is intruded upon must be entitled to be private. WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS at 855 (5th ed. 1984).

[130] *See* RESTATEMENT, *supra* note 119 at comment d, which explicitly requires this criterion. Courts may also take into account the nature of the intrusion, such as whether it "was done in a vicious and malicious manner not reasonably limited and designed to obtain the information needed..." and was "calculated to frighten and torment...." Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 122 S.E.2d 119, 123 (Ga. Ct. App. 1963). Some courts have applied or recognized an even more stringent requirement of "outrageous conduct," where the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. RESTATEMENT, *supra* note 119.

[131] *See, e.g.*, Horstman v. Newman, 291 S.W.2d 567 (Kan. Ct. App. 1956) (per curiam) (landlord may enter tenant's land to demand rent due); Engman v. Southwestern Bell Telephone Co., 631 S.W.2d 98 (Mo. Ct. App.

The first condition may not be difficult to meet, although it should be noted that any unintentional access to an E-mail message by a system administrator during system maintenance, for example, would certainly defeat an employee's privacy claim. In terms of the location and private nature involved, company lawyers may successfully argue that E-mail at the work location is within the work context and should not be deemed private as such. Moreover, an employee may have difficulty proving that any private communication was actually read.[132]

The last two factors that have been considered by courts present greater difficulty for employees. For example, an employee would have to convince the court that the employer's intrusion was "highly offensive" to a reasonable person. Courts may not consider the accessing and reading of employee E-mail to be "highly offensive," particularly if a court finds that the employee had no expectation of privacy in his or her E-mail.[133] Yet the courts may compare the use of a personal computer E-mail password to the use of a padlock on a locker, as in *K-Mart*

1982) (telephone company may enter home of individual who had not paid the phone bill, in order to remove the company's phones); and Schmukler v. Ohio Bell Tel. Co., 66 Ohio L. Abs 213, 116 N.E.2d 819 (C.P. 1953) (no invasion of privacy where telephone company monitored residential phone after discovering the number of calls to be excessively high, where the monitoring was for a short period of time and was done for business purposes).

[132] *See* Marks v. Bell Telephone Co., 460 Pa. 73, 331 A.2d 424 (1975), where an attorney sued a city and the telephone company because the police department recorded all of its incoming and outgoing telephone calls. No recovery was granted because the attorney could not prove any private conversation was heard or replayed.

[133] For an analysis of how courts might consider an expectation of privacy relative to company E-mail, *see supra* p. 13.

Corporation Store No. 7441 v. Trotti,[134] where a Texas court found that an employer unreasonably intruded on an employee's privacy when the employee's co-workers searched her locker which was secured with her own lock.[135] The courts may also find an employee E-mail search to be unreasonable if no advance notification was given, or a union official was not present.[136] Still, the courts may consider the offensiveness of the intrusion in light of the legitimate purpose criterion.[137] For example, in *Oliver v. Pacific N.W. Bell Tel. Co.*,[138] the court found that the "highly offensive" standard was not met where the employer monitored telephone conversations for the purposes of evaluating performance and whether or not an employee was disclosing documents to a competitor.[139] For this reason, a common law decision may ultimately hinge on a finding of a legitimate business purpose. As with the ECPA exceptions, an employer may easily satisfy this criterion by producing reasons for the interceptions that a court may find persuasive--such as the need to assess performance, protect against theft,[140] search for violations in disclosing trade secrets,[141] obtain information in a business emergency, or simply promote efficiency.[142]

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[134] 677 S.W.2d 632 (Tex. Ct. App. 1984), *writ of error denied*, 686 S.W.2d 593 (Tex. 1985).

[135] 677 S.W.2d 632, 637. The court held that "the element of a highly offensive intrusion is a fundamental part of the definition of an invasion of privacy." at 637

[136] *See, e.g.*, International Nickel Co., 50 Lab. Arb. 65 (Shister 1967) and B.F. Goodrich, 70 Lab. Arb. 326 (Oppenheim 1978), as cited by 2 G. TRUBOW, *supra* note 117, at 9-52.

[137] Although it is argued that the purpose factor is too often merged with the question of outrageousness or offensiveness. *See*, 1 G. TRUBOW, PRIVACY LAW AND PRACTICE 1-83 to 1-84 (1991).

[138] 53 Or. App. 604, 632 P.2d 1295 (1981).

[139] *See also* Froelich v. Werbin, 212 Kan. 119, 509 P.2d 1118 (1968); *second appeal*, Froelich v. Adair, 213 Kan. 357, 516 P.2d 993 (1973); *third appeal*, Froelich v. Werbin, 219 Kan. 461, 548 P.2d 482 (1976), where the Kansas Supreme Court considered an intrusion to be offensive when a hospital orderly collected a hair sample from a patient's hairbrush for the purpose of establishing the patient's homosexuality (although a dissenting opinion stated that the purpose of the intrusion was irrelevant). 516 P.2d at 998.

There are other factors that may also affect recovery, such as whether or not the employee must show anguish and suffering as a result of the privacy invasion.[143] The courts may also consider whether or not the employee consented (expressed or implied) to the monitoring,[144] and whether or not the search was in accordance with an announced inspection policy.[145] In addition, a decision may turn on an analysis of common law privilege. Here, a court may find that within the employer-employee relationship, certain communications constitute a conditional privilege, possibly giving an employer justification in examining E-mail messages as information that affects a sufficiently important interest of the company.[146] Courts have not expressly adopted common law privileges in "intrusion upon seclusion" actions, but such an analysis may occur.[147]

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[140] A search for stolen property by an employer has also been held not to be an unreasonable invasion of privacy. *See* 2 G. TRUBOW, *supra* note 117, citing Cherkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp., 479 F. Supp. 207 (S.D.N.Y. 1979). *But see* K-Mart Corporation Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984), *writ of error denied*, 686 S.W.2d (Tex. 1985), where the court determined that mere suspicion that an employee stole merchandise was insufficient to justify a search of the employee's locked locker without consent. 677 S.W.2d at 640.

[141] Oliver v. Pacific N.W. Bell Tel. Co., 53 Or. App. 604, 632 P.2d 1295 (1981).

[142] *See, e.g.*, Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962), where the court found a legitimate business interest in photographing employees without their consent for purposes of a study to increase efficiency. Note also that an employer may defend its monitoring actions by pointing to the RESTATEMENT (SECOND) OF AGENCY CH. 13, TITLES B, C (1957), which suggests that an employee owes a duty of loyalty and a duty to act with reasonable skill and care to the employer.

[143] *See* Hoth v. American States Ins. Co., 735 F. Supp. 290, 293 (N.D. Ill. 1990), where the plaintiff failed to state a cause of action in Illinois for invasion of privacy where an employer searched his desk and file cabinets because the employee suffered no anguish and did not allege that the employer lacked authority to conduct the search.

[144] PROSSER & KEETON, *supra* note 129, at 867.

Finally, in applying various criteria, the courts may specifically analogize employee E-mail intrusions under common law to common law actions associated with the opening of personal mail, eavesdropping, and hidden tape recordings.[148] Few cases appear to exist that address a common law cause of action associated with privacy and the mail. Yet, in *Vernars v. Young*,[149] a tort law claim of invasion of privacy was considered valid where a corporate officer opened and read a fellow corporate employee's mail which was delivered to the corporation's office and marked personal. This case suggested that a reasonable expectation of privacy under common law may exist in one's mail.[150] Other related cases involving eavesdropping and recordings, however, reveal only little relief for employees, since a legitimate business purpose often prevails.[151] The courts may nonetheless take into account whether or not the intercepted communications were subsequently disclosed and whether the employer instigated the action. In *Beard v. Akzona, Inc.*,[152] for example, a secretary was fired after her husband, also an employee, turned over to their employer telephone tape recordings of her conversations with a fellow employee (with whom she was having an affair). No invasion of privacy was established because the tapes were not heard by anyone other than the employer's managerial staff, and the employer did not instigate the deception. In this sense, a court may find no invasion of privacy with E-mail if a network manager--on his or her own initiative--turns E-mail files over to corporate management, and the contents of the messages are not publicly disclosed.

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[145] 2 G. TRUBOW, *supra* note 117, citing Cherkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp., 479 F. Supp. 207 (S.D.N.Y. 1979), where a court held that an employer may search an employee's purse in accordance with an announced inspection policy.

[146] For example, insurance claims investigators may have a privileged relationship with a claimant who may be deemed to have consented to a reasonable investigation upon filing an injury claim. *See* Senogles v. Security Ben. Life Ins. Co., 217 Kan. 438, 536 P.2d 1358 (1975).

[147] 1 G. TRUBOW, *supra* note 137, at 1-92.

[148] Courts may also compare E-mail to a lock (or unlocked) desk drawer. *See supra* notes 134 and 140. It is also possible that an E-mail message may be likened to a bulletin-board notice, in which case protection would not likely be found. Note that because telephone eavesdropping and wiretapping cases are generally subject to constitutional and statutory law, they are not often treated under common law.

[149] 539 F.2d 966 (3d Cir. 1976).

To date, no court has considered whether E-mail interception constitutes an unreasonable, offensive intrusion into the private affairs of workers.[153] What few cases exist concerning E-mail searches have been brought under a suit of wrongful termination (resulting from the employer having read the mail),[154] ECPA violation,[155] or passing trade secrets,[156] and have largely been thrown out, settled out of court, or are still pending. Thus, while the courts have generally tolerated the surveillance of employees--at least where a legitimate business interest is found--how the courts will treat and balance employer and employee interests relative to E-mail searches remains uncertain.

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[150] In fact, the court cited a telephone wiretapping case, Marks v. Bell Telephone Co. of Pa., 460 Pa. 73, 331 A.2d 424 (1975) commenting that "[j]ust as private individuals have a right to expect that their telephonic communications will not be monitored, they also have a reasonable expectation that their personal mail will not be opened and read by unauthorized persons." 539 F.2d at 969. In *Marks*, however, privacy rights were not considered infringed because no private conversation was intentionally overheard.

[151] *See, e.g.*, Schmukler v. Ohio Bell Tel. Co., 66 Ohio L. Abs 213, 116 N.E.2d 819 (C.P. 1953). (*Supra* note 131) *See also* McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 75 (1982), where secret recordings were made by franchisees of business conversations with the company and were turned over to the franchisees' attorney. The court found that the employees were acting in their corporate representative capacities, rather than their individual capacities.

[152] 517 F. Supp. 128 (E.D. Tenn. 1981).

V. PROPOSED LEGISLATION

Several bills have recently been introduced in Congress to address E-mail and other forms of electronic monitoring of employees. The complaints of workers from airline reservation agents, secretaries, telephone operators, and a broad range of blue-collar America first registered in Washington, D.C., a few years ago with similar proposed legislation. But only recently have the bills caught the interest of lawmakers and the White House.[157]

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[153] Casarez, *supra* note 17.

[154] This includes a case brought by Rhonda Hall and Bonita Bourke against Nissan Motor Company which allegedly fired the pair after reading the women's personal E-mail messages on the company's system. *See supra* note 18 and accompanying text. A California court reportedly has rejected the privacy claim in an unpublished decision (Bourke v. Nissan Motor Corp., No YC 003979, 1993). *See* Michael Furey, Lynn Anderson, Shelly Dean & Scott Ohnegian, *Overview: More Whistleblowers?*, NEW JERSEY L.J., April 11, 1994, at 4. A wrongful-termination charge also applied to cases involving Alana Shoars, formerly an E-mail administrator at Epson America, who was allegedly fired for complaining about her boss reading the supposedly private E-mail of Epson employees. (Shoars v. Epson America, Inc., No. SWC 112749, Los Angeles Superior Court (1990); Flanagan v. Epson America, Inc., Calif. Super. Ct., No. BC 007036 (1991)(class action suit)) *See supra* note 17. Both Epson cases were dismissed by lower courts, but are currently on appeal. Pillar, *supra* note 2, at 122.

[155] 816 F. Supp. 432. *See supra* note 98 and accompanying text.

[156] This pertains to the case filed by Borland International against former employee Eugene Wang and Symantec Corporation. Dean, *supra* note 8. *See supra* note 20, 156 and accompanying text. The case is still pending and may take into account a possible violation of the ECPA because the E-mail messages were obtained from the MCI Mail network.

The Privacy for Consumers and Workers Act, sponsored by Senator Paul Simon (D-Ill.),[158] and its companion bill in the House,[159] were originally drafted to prevent telephone companies and telemarketing firms from monitoring the telephone calls of operators and telemarketers. They were later revised to curb snooping on employees via video cameras. But recent revisions expand the scope of the legislation to cover all kinds of computer communications, including E-mail and voice mail.[160]

The proposed law would limit monitoring in several ways, including the following:

1) Employers would have to tell new employees how they might be monitored and how the collected data would be used,[161]
2) Employers would be required to give advance notice (day and hour) that monitoring will take place[162] (House version:[163]

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[157] Blackman & Franklin, *supra* note 1.

[158] S. 984, 103d Cong., 1st Sess., 139 CONG. REC. S6122 (1993).

[159] H.R. 1900, 103d Cong., 1st Sess., 139 CONG. REC. E1077 (1993) (introduced by Rep. Pat Williams (D-MT).

[160] Brown, *supra* note 32.

[161] S. 984, *supra* note 158, § 4(B).

[162] *Id.* § 4(B)(3).

[163] The House version underwent several modifications in early 1994 that are reflected here. *See, e.g., Section by Section Analysis of the Substitute Privacy for Consumers and Workers Act (HR 1900)*, DAILY LAB.

notice not required to specify day/hour),

3) The total time that an employee could be monitored would be capped at two hours per week[164] (House version: unlimited during the first 60 days of employment, 40 times/month for first two years, and 15 times/month thereafter[165]), and

4) Periodic or random monitoring of long-term employees (over 5 years) would be prohibited[166] (House version: continues at 15 times/month[167]).

The legislation also requires that notice be given to others (nonemployees) who may also be monitored[168] (which may pose interesting difficulties in the case of E-mail addressees and senders). Employers may only collect and review data limited to an employee's work,[169] and cannot intentionally engage in electronic monitoring of an employee engaged in First Amendment rights.[170] In addition, no action may be taken by the employer based on any personal data that was illegally obtained.[171] The legislation also does not require advance notice if an employer suspects the employee is engaged in unlawful activity, willful

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REP., Feb. 24, 1994, at d32.

[164] S. 984, *supra* note 158, § 5(B)(2). New employees may be monitored for no more than 60 days. (§ 5(B)(1))

[165] *Supra* note 163, § 5.

[166] S. 984, *supra* note 158, § 5(B)(3).

[167] *Supra* note 163, § 5.

[168] S. 984, *supra* note 158, § 4(E).

[169] *Id.* § 6(B) and § 10(A).

[170] *Id.* § 10(C).

[171] *Id.* § 8(a).

gross misconduct, or conduct that would have a "significant adverse effect" on the employer or other employees.[172] It allows employers to access information in case of "immediate business needs."[173] Finally, it provides exceptions for financial institutions, securities firms, the intelligence community, and gambling facilities.[174]

The proposed legislation has so far attracted many co-sponsors, but has also spurred considerable debate. The Department of Labor, for instance, has not been in favor of the legislation, partly because it considers the bills to contain too many unclear terms and overly broad definitions that pertain to management practices in which personal employee data do not have relevance.[175] Others consider the bills to be unnecessarily burdensome for small businesses and difficult to interpret and administer.[176] The telephone companies, including AT&T, are especially speaking out against the measure.[177] There is concern about the impact of the bills on E-mail management and usage. They argue that the legislation could cripple the electronic messaging business. Thus with such opposition, the legislation may not succeed in providing relief for E-mail users just yet.

Another bill introduced in Congress that has not gained as much attention but is still under consideration is the Telephone Privacy Act of 1993, introduced by Senator Dale Bumpers (D-AR).[178] This bill would do essentially the opposite, making it lawful to intercept an electronic communication where "such person is an employer or its agent engaged in lawful electronic monitoring of its employees' communications made in the course of the employees' duties."[179] The bill has not advanced, but its introduction indicates that the matter is still open to debate and may not be easily settled.

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[172] *Id.* § 5(C)(1).

[173] *Id.* § 9(A).

[174] *Id.* § 13(C).

[175] *See, e.g.*, Jennifer J. Laabs, *Surveillance: Tool or Trap?*, 71 PERSONNEL J. 96 (June 1992).

[176] Bureau of National Affairs, Inc., *Pros, Cons of Privacy Bill Explored During Senate Hearing*, DAILY LAB. REP., June 23, 1993.

[177] *CWA Calls Monitoring 'Menace;' Bill Would Force Companies to Disclose Monitoring Practices*, COMM. DAILY, June 24, 1993, at 3.

VI. CONCLUSIONS

Current law thus appears to generally favor employers when it comes to E-mail monitoring in the workplace. Constitutional privacy rights only pertain to government interceptions, and federal statutory law does not appear to provide protection for interceptions within an intracompany system. Prior consent and business use exemptions of federal and state statutory laws may be construed to permit monitoring. State laws specifically addressing the E-mail issue are lacking, and a common law right of privacy may not be found to protect employee E-mail interests. Unless the courts provide a precise interpretation of the existing law in favor of employee privacy interests, or adequate legislation is passed, employees may be at the mercy of employers who take an active role in browsing through their E-mail. In fact, more employers may take advantage of this "new" opportunity once they understand that it may not be unlawful.

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[178] S. 311, 103d Cong., 1st Sess., 139 CONG. REC. S1390 (1993).

[179] *Id.* § 2, amending § 2511(2)(d) of title 18 United States Code.

Electronic mail presents a difficult case for lawmakers because it falls somewhere between a telephone call and written correspondence. Some business people may feel comfortable with an employer's right to examine written material, but would not sanction listening in on phone conversations. Yet case law generally permits telephone extension monitoring,[180] while mail is afforded greater privacy protection.[181] While both employers and employees have valid concerns about E-mail privacy, striking a balance may not be easy.

The answer may exist in adopting a legislative solution, but only if the law is carefully crafted and clearly applicable to E-mail and similar electronic storage systems. States may act now by proposing laws aimed at placing restrictions on monitoring. But because corporate communications cross state lines, a federal policy should also be adopted to provide uniform protections.

The Privacy for Consumers and Workers Act,[182] currently pending in Congress, addresses many of the concerns and uncertainties raised by the existing laws. As with the rulings under common law, employers would have to steer clear of communications that are not work-related[183] and could not act on any personal information that may be unintentionally encountered.[184] The legislation requires advance notice, yet does not go so far as to prevent surreptitious monitoring to uncover suspected misconduct.[185] Finally, it provides protections that would apply to all operations--whether intrastate or interstate--and generally does not allow for any waivers (i.e., consent) by employees of their rights under the law.[186]

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[180] *See supra* pp. 21, 26, 36, 40.

[181] Vernars v. Young, 539 F.2d 966 (3d Cir. 1976). *See supra* note 149 and accompanying text. *See also* Annotation, *Opening, Search, and Seizure of Mail*, 61 A.L.R. 2d 1282 (1958 & LATER CASE SERVICE 1984 & 1993) for an analysis of the search and seizure of mail under the U.S Constitution. Generally, first-class mail is fully protected, although other classes of mail are not entitled to Fourth Amendment protection when in the custody of postal authorities.

[182] S. 984, *supra* note 158, and H.R. 1900, *supra* note 159.

[183] S. 984, *supra* note 158, § 6(B) and § 10(A).

Unfortunately, the Privacy for Consumers and Workers Act may also be too narrow in scope and may not adequately balance the needs of both employers and employees. The specific restrictions that limit monitoring to only new employees and to specified amounts of time or observations (i.e., 40 times a month[187]) are too inflexible and do not take into account the type of business operation. For example, allowing unrestricted monitoring of new employees (first 60 days) and no monitoring of those beyond five years of employment[188] may be too specific, not accounting for special needs or the privacy rights of new employees. Moreover, monitoring of all employees for more than two hours per week[189] may be justifiable and even necessary for polling and survey research organizations and telemarketing firms--which are not exempted under the legislation. Yet allowing college administrators the ability to monitor untenured faculty E-mail for up to two hours per week would hardly seem acceptable.[190]

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[184] *Id.* § 8(a).

[185] *Id.* § 5(C)(1).

[186] *Id.* § 12(d).

[187] H.R. 1900. *See supra* note 163, § 5.

[188] S. 984, *supra* note 158, § 5(B)(1), (3).

[189] *Id.* § 5(B)(2).

There is also no agreement so far between the House and Senate bills as to whether or not employees must be given advance notice of a company's monitoring in general, or whether the employees must be given the exact days and hours when the monitoring will take place. Some adequate compromise will need to be achieved on this point. Precise notice may go too far in stripping employers of the ability to access company computer files outside of specified monitoring periods. The ability to manage and control safety, quality, and efficiency could be negatively affected. Yet having only a general company policy with vague monitoring procedures may go too far in allowing employers the ability to monitor employee E-mail anytime. In either case, the employer's ability to monitor is sanctioned by eliminating the surreptitious nature of the monitoring (and hence the expectation of privacy) with less regard given to the reasonableness of the intrusion and the particular needs or circumstances involved.

Finally, the proposed legislation addressing "electronic monitoring" does not cover interceptions of electronic communications as protected under the ECPA.[191] Thus, if the ECPA is held to be applicable to employee E-mail actions, then the accessing and reading of E-mail files may fall outside of the proposed legislation. Under the ECPA, the prior consent or business use exemptions may pertain, and monitoring may be found permissible--at least on an interstate basis.

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[190] The accessibility of college faculty E-mail is already being scrutinized. Some government offices are declaring that government employee E-mail is subject to the Freedom of Information Act and must be available to the public and the press to the same extent as other government records. Whether the E-mail of employees of state-supported institutions must be available to the public is unclear. The University of Michigan recently addressed this issue and maintained that its E-mail is off-limits, arguing that the E-mail is not "owned" by a public body. *See, e.g.*, Karl Bates, *U-M Takes Stand: E-mail is Private*, ANN ARBOR NEWS, Jan. 12, 1994, at B1, B3. Yet later, in response to requests by two newspapers, the university released copies of messages exchanged during a computer conference of the school's regents. *Online*, CHRONICLE HIGHER EDUC., April 27, 1994, at A26.

Senator Bumpers' bill--the Telephone Privacy Act of 1993[192]--also goes too far in granting employers unlimited access, including access to E-mail of a personal nature. While it can be argued that private, personal discussions have no place in the office, this argument is unrealistic. The legislation is overly broad, ignoring any privacy rights or interests of employees.

Proposed Guidelines

A federal monitoring law with very specific provisions may never fully meet the needs of employee privacy while preserving employer management needs. The type of federal policy that should be adopted must be flexible and aimed at preventing unreasonable intrusions relative to varying types of business operations, organizational needs, and employee privacy needs. It must also be broad so that it may clearly apply to all forms of similar surveillance and be able to accommodate future communications technologies.

Such a broad federal policy could require that monitoring be "reasonable," requiring employers to 1) have a "legitimate business purpose" for engaging in monitoring, 2) use the least intrusive means possible to achieve the business objective, 3) limit the access, use, and disclosure to information reasonably meeting that objective, and 4) provide reasonable notification of the monitoring and its use. Instead of specifying 40 service observations per month, for example, the courts could be the ultimate arbiters in defining the scope of "reasonableness" relative to different types and degrees of intrusion for different industries and as technologies and conditions change over time.

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[191] S. 984, *supra* note 158, § 2(2)(C)(i).

[192] S. 311, *supra* note 178.

The federal law could then promote the education of employers and employees on the issue and mandate the development of company monitoring policies which could then provide the particular specificity that may be needed, within the federal guidelines on reasonableness. It is imperative that employers create a company policy that clearly spells out monitoring practices and employee privacy specific to that company's operation. Federal law could require a company's electronic monitoring policy to accomplish several objectives, such as:

1) identify the acceptable reasons for surveillance and the specific business purpose to be achieved.

2) explain what monitoring procedures may and may not be used.

3) contain limitations on what is collected and the use of the information obtained, restricting it to its stated purpose and ensuring confidentiality.

4) provide for reasonable security measures to prevent unauthorized access.

5) allow only limited, authorized access, defining authorization and who may grant and be granted authorization.

6) make clear to employees that the security of their E-mail, for example, is not guaranteed and that E-mail may not be protected by privacy law.

7) establish employee usage guidelines, such as whether or not the system may be used for nonbusiness (personal) exchanges, when and to what extent.

8) provide for penalties for policy violations by employers and employees.

9) be made available to all employees at the time of being hired and periodically thereafter.

10) be periodically reviewed.

The restrictiveness of a company's E-mail policy will depend on the specific work environment and the needs of both the company and the employees. The "reasonableness" of the policy will be kept in check by federal law as well as market forces, whereby too restrictive of a policy may result in worker dissatisfaction, lower productivity, and unfilled positions. E-mail administrators and network managers should review the existing law and the proposed legislation with their corporate legal departments. Of course the best policy that a company could adopt may be to avoid monitoring E-mail systems at all, whether for the purpose of uncovering wrong-doing or for even accessing files for what might otherwise seem to be legitimate purposes.[193]

In the meantime, employees should take an active role in becoming more aware of the potential for monitoring and find out whether or not a company E-mail monitoring policy exists. If none is available, employees should demand that a policy be created, be involved in its creation, and become familiar with its provisions. Notwithstanding, employees should always be discreet and assume that there is no privacy with their E-mail. In general, employees should protect themselves by limiting their use of the system to matters of company operations, and as a rule, never send anything that one would not send to a fax machine or on a postcard.

If both employers and employees take steps to protect themselves--

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[193] Companies may also want to get a help kit designed to help companies develop an E-mail policy. The kit is available from the Electronic Mail Association, 1555 Wilson Blvd., Suite 300, Arlington, VA 22209 (703) 875-8620.

even from unintentional intrusions--and federal and corporate policies are developed, some reasonable balance between privacy needs and management needs may be reached. Right now, there is a significant gap between employees' perceptions of E-mail privacy and the rights of employers to monitor messages. Employees are either unaware of the possibility of monitoring or believe it is illegal. Companies are also lax in responding to the issue and in examining their management monitoring practices. Given the rapid growth of electronic mail, it is likely that more lawsuits will be filed over the issue of E-mail privacy. Company monitoring policies, general public awareness, and a broad federal law prohibiting unreasonable intrusions should be created to address this new workplace issue.

TABLE 1
State Constitutions Explicitly Recognizing A Privacy Right*

ALASKA CONST., Art 1, § 22: "The right of the people to **privacy** is recognized and shall not be infringed upon."

ARIZ. CONST., Art 2, § 8: "No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law."

CAL. CONST., Art. 1, § 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring safety, happiness, and **privacy**."

FLA. CONST., Art 1, § 23: "Every natural person has the right to be free from governmental intrusion into his **private life** except as otherwise provided herein."

HAWAII CONST., Art. 1, § 6: "The right of the people to **privacy** is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

ILL. CONST., Art. 1, § 6: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, **invasions of privacy** or interceptions of communications by eavesdropping devices or other means."

LA. CONST., Art. 1, § 5: "[E]very person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy**."

MONT. CONST., Art. 2, § 10: "The right of **individual privacy** is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

S.C. CONST., Art 1, § 10: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and **unreasonable invasions of privacy** shall not be violated . . . ."

WASH. CONST., Art. 1, § 7: "No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law."

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*Emphasis added.

TABLE 2
States With Prior Consent and Business Use Wiretap Exemptions

Arizona	A.R.S. @ 13-3012 (1993)
Colorado	C.R.S. 18-9-305 (1993)
Delaware	11 Del. C. @ 1336 (1993)*
District Columbia	D.C. Code @ 23-542 (1993)*
Florida	Fla. Stat. 934.03 (1993)**
Georgia	O.C.G.A. @ 16-11-66 (1993)***
Hawaii	H.R.S. 803-42 (1993)
Idaho	Idaho Code 18-6720; 18-6702 (1993)*
Iowa	Iowa Code @ 808B.2 (1993)*
Kansas	K.S.A. @ 22-2514; 21-4001 (1992)
Louisiana	La. R.S. 15:1303 (1992)*
Maryland	Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. 10-402 (1993)**
Minnesota	Minn. Stat. 626A.02 (1993)
Mississippi	Miss. Code Ann. @ 41-29-531 (1993)*
Missouri	@ 542.402 R.S.Mo. (1992)*
Nebraska	R.R.S. Neb. 86-702 (1992)
Nevada	Nev. Rev. Stat. Ann. @ 200.620 (1993)
New Hampshire	RSA 570-B:3; 570-A:2 (1993)* **
New Jersey	N.J. Stat. @ 2A:156A-4 (1993)*
New Mexico	N.M. Stat. Ann. @ 30-12-1 (1993)*
North Dakota	N.D. Cent. Code, @ 12.1-15-02 (1993)*
Ohio	ORC Ann. @ 2933.52 (BALDWIN) (1994)*
Oklahoma	13 Okl. St. @ 176.4 (1994)*
Oregon	ORS @ 165.543 (1991)
Pennsylvania	18 Pa.C.S. @ 5704 (1993)**
Rhode Island	R.I. Gen. Laws. @ 11-35-21 (1993)*
Texas	Tex. Penal Code @ 16.02 (1994)*
Utah	Utah Code Ann. @ 77-23a-4 (1993)
Virginia	Va. Code Ann. @ 19.2-62 (1993)
West Virginia	W. Va. Code @ 62-1D-3 (1993)
Wisconsin	Wis. Stat. @ 968.31 (1993)
Wyoming	Wyo. Stat. @ 7-3-602 (1993)

Statutory provisions similar to Title 18 USCA § 2511(2)(d) (Prior Consent) and §§ 2510(5)(a) and/or 2511(2)(a)(i) (Business Use) exemptions of the federal Electronic Communications Privacy Act of 1986 (ECPA).

*Exempts interceptions by communications common carriers, rather than electronic communication service providers.

**Prior Consent must be given by ALL parties.

***Prior Consent Exemption only.

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The Legal Rules
# of Broadcast Newsgathering

A Research Paper

by

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Presented

Wednesday, August 10, 1994

to the

Association for Education
in Journalism and Mass Communications
(Law Division)

Atlanta, Georgia

You are at work, doing your job the same way you've done it for months, perhaps years. A newly-hired co-worker asks you to tell her what you're doing. You answer gladly, unaware she is carrying a small video camera, a microphone, and a recorder hidden under her clothing. The "co-worker" is actually a network news producer investigating your employer undercover. She never told you that. She never told you she was interviewing you on tape without your consent.

You arrive at a hotel for a meeting with your attorney and a television reporter. The reporter wants to know about your ties to a judge he's investigating for alleged corruption. The meeting is supposed to be private, but the reporter confronts you with a series of accusatory questions as you step out of your taxi. A camera crew right behind him records the entire episode. It's an "ambush" interview; you never consented to be on camera.

Broadcast journalists have made hidden camera reports and so-called "ambush" interviews standard practice in investigative reporting. Some journalists have faced lawsuits as a result. ABC News faced a charge that it had violated federal wiretap law after reporter Geraldo Rivera used an "ambush" interview for a "20/20" investigation of judicial corruption in Ohio.[1] The Food Lion supermarket chain is suing ABC news for fraud and misrepresentation of facts as a result of a "Prime Time Live" hidden camera report about allegedly unhealthy food handling at some Food Lion stores.[2] The story also led to an ethical debate in the pages of the *Washington Post*, which addressed how broadcasters gather news in a front page article,[3] an opinion piece,[4] and two letters to the editor, including one from the executive producer of CBS's "60 Minutes."[5] Hidden camera reports, "ambush" interviews, and other types of reporting raise legal questions, and the issue that comes up most often is whether a reporter needed and obtained someone's consent before recording that person's comments or picture.

The legal issues Food Lion raised in its initial complaint include the alleged use of hidden cameras and whether any Food Lion employees may have been recorded without their consent for use in the "Primetime Live" report. This was not the first time radio or television news stories have led to disputes over those issues. Federal and state courts have decided cases involving not only hidden cameras[6] and "ambush" interviews,[7] but also what might be called "follow-along" stories, in which television crews accompany such people as social workers or law enforcement officials into homes,[8] schools,[9] businesses,[10] or wherever those workers go on the job.

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[1] Brooks v. Am. Broadcasting Cos., 932 F.2d 495 (6th Cir. 1991).

[2] Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92 CV 592 (M.D.N.C. filed Sept. 21, 1992).

[3] Howard Kurtz, *Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings*, Washington Post, Nov. 30, 1992, at A1.

[4] Richard Harwood, *Knights of the Fourth Estate*, Washington Post, Dec. 5, 1992, at A23.

[5] Don Hewitt, *Hidden Cameras, Hard-Hitting Journalism*, Washington Post, Dec. 12, 1992, at A23; Colin Guard, *supra*.

[6] *See, e.g.*, Boddie v. Am. Broadcasting Cos., 731 F.2d 333 (6th Cir. 1984); Boddie v. Am. Broadcasting Cos., 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990).

[7] *See, e.g.*, *supra* note 1.

Those newsgathering methods are often used in investigative reporting, on which broadcasters certainly do not hold a monopoly. Newspaper and magazine investigations have raised legal issues similar to those raised by radio and TV stories. One early example was *Dietemann v. Time, Inc.,*[11] involving a magazine reporter posing as a patient and using a hidden still camera and a hidden microphone to investigate a suspected "quack" doctor. It is true that print newsgathering methods sometimes resemble what radio or television journalists do. But no matter how close the similarity may be, there are distinctions.

One distinction is legal. The Federal Communications Commission requires that before recording telephone interviews, broadcasters must inform the people they interview that a tape will be rolling.[12] Although it has been pointed out that print journalists sometimes also record interviews, supposedly for accuracy in quoting,[13] there is no government regulation of print reporters' conduct. Broadcasters have also been sued under federal wiretap law in disputes not covered by FCC rules, usually involving people's claims that their voices were recorded without their consent and then put on the air.[14] Print journalists have also been sued for allegedly violating federal wiretap law by eavesdropping.[15] But the broadcast cases differ from the print cases; someone's voice cannot appear in a newspaper or magazine.

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[8] *See, e.g.,* Baugh v. CBS, Inc., 828 F.Supp. 745 (N.D.Cal. 1993).

[9] *See, e.g.,* Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc., 327 So.2d 810 (Fla.App. 1976), *cert. denied,* 340 So.2d 1154 (Fla. 1976).

[10] *See, e.g.,* Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832 (Kan.App. 1979).

[11] 449 F.2d 245 (9th Cir. 1971). Held that the plaintiff could sue for invasion of privacy under California law and that the First Amendment did not protect Time, Inc. against liability.

[12] 47 C.F.R. 73.1206, which states in part:

"Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation...."

The use of voices -- and often moving pictures, too -- raises another print/broadcast distinction: the dramatic effect of some broadcast news reports, particularly on television. Newspapers and magazines can use only still photographs and direct quotes to support the facts they give. Broadcasters, on the other hand, can roll the tape for as long as time will allow. They can show a reporter confronting a newsmaker, as ABC did after Geraldo Rivera "ambushed" a man outside an Ohio hotel for a story about the man's ties to an allegedly corrupt judge.[16] The man, once he saw the camera, left, "muttering some obscenities."[17] If the journalist is shown observing but not participating, the effect can be the same, as when a crew from PBS's "MacNeil/Lehrer NewsHour" followed a union official into a factory unannounced as the official tried to retrieve back pay for a recently fired worker.[18] The point is that broadcast journalists sometimes become part of the stories they cover in a way only their media allow.

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[13] Theodore L. Glasser, *On the Morality of Secretly Taped Interviews*, Nieman Reports, Spring 1985, at 17-20; Robert L. Spellman, *Tort Liability of the News Media for Surreptitious Recording*, Journalism Quarterly, Summer 1985, at 289-95.

[14] *See infra* notes 50-65 and accompanying text.

[15] *See, e.g.*, Smith v. Cincinnati Post & Times-Star, 475 F.2d 740 (6th Cir. 1973).

[16] Brooks v. Am. Broadcasting Cos., 932 F.2d 495 (6th Cir. 1991). See text accompanying *supra* note 1.

[17] *Id.* at 496.

[18] *MacNeil/Lehrer NewsHour* (PBS television broadcast, Nov. 5, 1993).

What rules, then, have the courts and the Federal Communications Commission established for radio and television newsgathering? The above-mentioned FCC regulation on telephone interviews[19] is a rare concrete rule giving broadcasters clear guidance. This paper's purpose is to determine what other rules, if any, the FCC and the courts have established and to analyze the case law for trends, conflicts, and unanswered questions regarding the rules for broadcast newsgathering.

LITERATURE REVIEW

Little scholarly literature has dealt directly with regulations and court rulings on broadcast newsgathering. A few articles have mentioned television news briefly in discussing privacy claims against reporters, but broadcasting has typically been an afterthought. Most studies about whether someone must consent to be on radio or television have tended to focus on cameras in the courtroom,[20] sometimes addressing print as well as broadcasting.[21] One brief article, however, has addressed consent in general terms as it affects newspaper and television photographers.[22] Other studies with promising titles have dealt with consent issues related to print reporters wiretapping telephones[13] or secretly recording interviews for the supposed purpose of better accuracy.[14] It is conceivable that radio or TV reporters could also engage in wire-tapping, although cases involving broadcasters and wiretap law have not dealt with accusations of "bugging." Those cases have focused on applying wiretap laws to hidden camera[15] or "ambush" interviews[16] or other situations.[17] In addition, one paper on secret taping made the point that any tape a print reporter makes could conceivably be broadcast.[18]

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[19] *Supra* note 12.

[20] *See, e.g.*, Carolyn S. Dyer and Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 Geo. L.J. 1633 (1987).

[21] *See, e.g.*, Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 428 (1991).

[22] Michael D. Sherer, *The Problem of Trespass for Photojournalists*, Journalism Quarterly, Spring 1985, at 154-56, 222.

Only one researcher has analyzed broadcast newsgathering, and two others have made broadcasting part of their discussions of issues affecting all news media. In the *Case Western Reserve Law Review*, Kevin O'Neill argued that ambush interviews "inherently [create] false-light invasions of privacy" by putting people on the spot without letting them collect their thoughts before responding to questions.[19] It's an interesting analysis, inasmuch as it would seem more likely that intrusion would be the claim in "ambush" cases involving radio or TV reporters who walk into businesses or up to people's homes unannounced and with their recorders rolling.

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[13] Sam G. Riley and Joel M. Wiessler, *Privacy: The Reporter, the Telephone, and the Tape Recorder*, Paper presented to the Association for Education in Journalism, 1973.

[14] Glasser, *supra* note 13; Spellman, *supra* note 13.

[15] *See, e.g.*, Cassidy v. Am. Broadcasting Cos., 377 N.E.2d 126 (Ill.App. 1978).

[16] *See, e.g.*, Brooks v. Am. Broadcasting Cos., 999 F.2d 167 (6th Cir. 1993).

[17] *See, e.g.*, Boddie v. Am. Broadcasting Cos., 731 F.2d 333 (6th Cir. 1984); Boddie v. Am. Broadcasting Cos., 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990).

[18] Thomas W. Cooper, *Surreptitious Taping: The Arguments for and the Ethics Against*, Paper presented to the Eastern Communication Association, 1987.

[19] Kevin F. O'Neill, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 Case W. Res. L. Rev. 72, 76 (1983).

O'Neill's article did not focus on consent issues, but Michael Sherer did deal with consent in a brief article focusing on trespass law affecting photographers. Sherer found that courts tended to reject arguments that the First Amendment justified journalists' trespass onto private property.[23] He described consent as a "critical" issue[24] but did not analyze it in depth.

Lyrissa Barnett used examples of unannounced, cameras-rolling interviews in an article on the intrusion tort. She began her analysis of the tort's relationship to investigative reporting by recounting stories on ABC's "20/20" and CBS's "60 Minutes." But she focused the body of her paper on a rather broad-based discussion that did not single out specific broadcasting issues.[25] Barnett did, however, distinguish courtroom access from other newsgathering issues.

> The Supreme Court has never extended any additional or special protection to media defendants in tort suits involving newsgathering. Similarly, media arguments for special protection for newsgathering have fallen largely on deaf ears in the lower courts. Lower courts addressing intrusion claims generally refuse to weigh any First Amendment interest in gathering news in the balance.[26]

That is a matter of disagreement, however. Terence Clark, in an article that did not address broadcasting specifically, argued that freedom of the press has always taken precedence over individual privacy claims.[27]

Barnett's discussion may not have focused on radio or TV, but it did relate to broadcasting issues. She equated undercover investigative reporting to surreptitious government inspections of restaurants, auto repair shops, and other types of businesses.[35] Her point is valid; there have been cases involving disputes over TV crews following restaurant inspectors[36] and domestic violence counselors.[37]

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[23] *Supra* note 22, at 156.

[24] *Id.*

[25] Lyrissa C. Barnett, *Intrusion and the Investigative Reporter*, 71 Tex. L. Rev. 433 (1992).

[26] *Id.* at 439.

[27] Terence J. Clark, *Epilogue: When Privacy Rights Encounter First Amendment Freedoms*, 41 Case W. Res. L. Rev. 921, 923 (1991).

But most research into tort law and investigative reporting has done little more than touch on radio and TV. David Freedman, for example, dealt with newsgathering on private property. His article did not refer specifically to radio or television, but it certainly could have applied to them.[38] John Wade generally summarized the intrusion tort's effect on investigative reporters but without mentioning radio or television.[39] Wade did, however, bring up later in his article the issue of intrusion claims against TV reporters who could be mistaken for police or other officials and who fail to identify themselves.[40]

Only two researchers have recommended solutions to some of these legal problems, and they were dealing not with broadcast newsgathering but with surreptitious reporting regardless of medium. Barnett proposed two solutions. Perhaps as a result of her conclusion that privacy concerns often outweigh the First Amendment, she called for "a qualified common-law privilege to allow newsgatherers to use subterfuge in certain narrowly defined contexts." She proposed that the privilege be confined generally to investigations of public officials suspected of wrongdoing in connection with their official business.[41] Next, she proposed a "probable cause" test to justify the media's use of subterfuge. Such a test, she wrote, would be akin to the test law enforcement officers must meet to obtain search warrants.[42] She paid particular attention to the legality of investigative reporting by subterfuge, stating the courts have not given the media clear guidance[43] and warning that the media may, without such guidance, decide to avoid the risk of liability -- and thus not to investigate suspected misconduct.[44]

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[35] Barnett, *supra* note 32, at 453-54. Barnett made the analogy in support of her proposal to create a common-law privilege for certain types of investigative reporting. *See infra* notes 41-44 and accompanying text.

[36] Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832 (Kan.App. 1979).

[37] Baugh v. CBS, Inc., 828 F.Supp. 745 (N.D.Cal. 1993).

[38] David F. Freedman, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 Colum. L. Rev. 1298 (1984).

[39] John W. Wade, *The Tort Liability of Investigative Reporters*, 37 Vand. L. Rev. 301, 317-19 (1984).

[40] *Id.* at 338.

Freedman is the only other researcher to discuss a standard for such types of reporting. He mentioned but did not propose a possible "newsworthiness" standard for allowing media entry onto private property. But he cautioned such a standard could cause problems because, first, anything journalists attempt to cover could be considered newsworthy[45] and, second, such a standard might pit journalists' professional judgment against the courts' legal judgment.[46]

The literature to date has identified several controversial forms of newsgathering. Most of it has dealt with print-related issues such as recording interviews for accurate quotes. The research into the law on broadcast newsgathering is spotty at best. O'Neill and Barnett paid some attention to privacy and broadcast news, but their work, even taken together, does not cover all the legal issues radio and television reporting has raised. This paper attempts to fill that gap.

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[41] Barnett, *supra* note 32, at 449.

[42] *Id.* at 451-52.

[43] *Id.* at 443.

[44] *Id.* at 447.

[45] Freedman, *supra* note 38, at 1325.

[46] *Id.* at 1326.

RESEARCH QUESTIONS

This paper asks what rules the FCC and the courts have established to guide radio and TV journalists in gathering the news. Learning the answer requires the investigation of narrower questions about specific broadcast reporting methods:

1. Is there any legal rule or guideline that people being recorded for radio or television, by telephone or otherwise, must consent to be recorded?
2. What are the legal guidelines for broadcasters' use of hidden cameras?
3. What are the guidelines for broadcasters who do "follow-along" stories, especially if in preparing those stories the journalists wish to enter homes, businesses, or other private places?
4. What are the legal guidelines for broadcasters' conduct of "ambush" interviews?

REGULATORY AND CASE LAW

The Issues

The question of whether a broadcaster must obtain someone's consent before rolling a tape has permeated much of the case law of radio and TV newsgathering. It has affected cases involving hidden cameras, "ambush" interviews, and "follow-along" stories, as well as disputes over broadcasters' alleged violations of wiretap laws or FCC regulations. Most of the law is unsettled, but the rules for broadcasters are often the clearest when consent is the central issue. That may be because strict consent cases have been more common than hidden camera, "ambush," or "follow-along" cases. It appears clear that the law and the courts will protect journalists who obtain consent prior to recording.

Consent. The clearest legal guidance broadcasters have for their newsgathering comes from the Federal Communications Commission. FCC Rule 73.1206 requires broadcasters to inform people in advance if they intend to record telephone interviews.[17] Failure to do so can cost a station a fine of up to $25,000, although $5,000 is standard.[18] And the FCC has made it clear it expects all broadcasters to follow the Rule to the letter.

> The recording of [a telephone] conversation with the intention of informing the other party later -- whether during the conversation or after it is completed but before it is broadcast -- does not comply with the Rule if the conversation is recorded for possible broadcast.[19]

Most violations of the Rule have involved entertainment programming, such as when a disk jockey, as a prank, calls an unsuspecting listener and later broadcasts the conversation.[20] The entertainment cases can guide news departments, because the Rule affects all broadcasters without regard for their medium or the reasons they want to record telephone interviews. FCC records document relatively few news-related violations, some of which have involved disk jockeys calling public officials for purposes unstated in the record.[11]

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[17] 47 C.F.R. 73.1206, *supra* note 12.

[18] Policy Statement on Standards for Assessing Forfeitures, 6 F.C.C.Rcd 4695, 4699 (1991).

[19] Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules, 35 F.C.C.2d 940, 941 (1972).

[20] *See, e.g.*, Malrite Guaranteed Broadcasting, Inc., Radio Station WEGX-FM, Cleveland, Ohio, 7 F.C.C.Rcd 3191 (1992); Whale Communications of Colorado, Inc., FM Station KKMG, Pueblo, Colorado, 6 F.C.C.Rcd 7548 (1991).

Two recent cases shed more light on how the FCC has enforced Rule 73.1206. In one, the FCC rescinded a $5,000 fine against a South Carolina radio station which "had expressed its 'strong belief' that [a man being interviewed] was aware that his comments would be used in a broadcast news story. [The commission] pointed out, however, that the licensee had provided no evidence in support of its claim." The station later submitted an affadavit from its news director at the time of the incident, stating that the news director had informed the man that the interview was being taped and that the man had consented. The affadavit was not filed until after the station had been fined, but it cast doubt on the original complaint and left the FCC with an unresolvable conflict.[11]

The second case further defined the mitigating circumstances. A North Carolina radio station convinced the FCC to reduce a fine for violating the Rule from $5,000 to $3,500 because the station had a good record of compliance with commission rules before the violation. The commission, however, rejected the station's argument that the violation was minor because the complaint had been filed not by the person whose voice had been illegally recorded but by a third party who "had personal knowledge of the facts." "The rule," the FCC continued, "does not limit who may complain."[11]

The FCC has appeared willing to expand the meaning of Rule 73.1206 to deal with whether the person being interviewed has consented to being on the air. This is significant, because the Rule requires only that the broadcaster inform the interviewee, not that the interviewee consent to be recorded. The FCC began to read consent into the Rule in 1972, when it declared, "The obvious object of the Rule is to give the party called a real opportunity to refuse to have his conversation broadcast while not yet on the air."[54] The FCC has not made this extrapolation again explicitly, but it did specifically mention consent in the afore-mentioned news interview case in which the news director claimed to have gotten consent,[55] as well as in a 1992 entertainment programming case.[56] The commission itself did not raise the consent issue in either case, but it pointed out in both rulings that the stations involved had raised it.

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[11] *See, e.g.*, Fairview Communications, Inc., Licensee, Station WBHT-FM, Wilkes-Barre, Penn., 9 F.C.C.Rcd 280 (1994).

[11] Radio Station WBAW, Inc., Licensee, Station WBAW-AM, Barnwell, S.C., 9 F.C.C.Rcd 248 (1994).

[11] WEG Broadcasting Corp., Licensee of Radio Station WFMC, Goldsboro, N.C., 9 F.C.C.Rcd 178 (1994).

Rule 73.1206 is the only FCC regulation directly governing a broadcaster's conduct in gathering information for a news story. Because it deals only with telephone interviews, people with grievances against broadcasters that do not involve phone interviews must seek other laws under which to file lawsuits. One alternative is to sue for violation of federal -- and sometimes state -- wiretap law. An amended chapter in the federal Omnibus Crime Control and Safe Streets Act of 1968 makes it illegal for any third party to willfully intercept "any wire, oral, or electronic communication" or to willfully disclose or otherwise use the intercepted contents of such a communication.[57] But there's a caveat: Another

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[54] Western Broadcasting Co., Radio Station KKEY, Portland, Ore., 38 F.C.C.2d 1195 (1972).

[55] Text accompanying *supra* note 52.

[56] EZ Communications, Inc., Licensee of Radio Station KYKY-FM, St. Louis, Mo., 7 F.C.C.Rcd 1893 (1992).

[57] 18 U.S.C.A. 2511, whose relevant portions state:

"(1) Except as otherwise specifically provided in this chapter any person who --

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> ...
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this

paragraph of that chapter, Section 2511(2)(d), appears to give people other than law enforcement officers the legal right to record conversations without obtaining the other party's consent.[11] That section appears to affect not third parties but people taking part in a recorded conversation. The section is not directed at the news media, but it has been applied in media cases in which people claim they did not consent to be on audio or videotape.

An ABC News probe into an allegedly corrupt Ohio judge led to a series of cases that demonstrate well the application of the federal wiretap law. The cases are probably the best examples the courts have faced of the electronic newsgathering methods about which critics in the print media sometimes complain.[12] They also show how the courts have often avoided making broad constitutional rulings and have focused instead on narrow procedural or statutory matters.

In the first case, *Boddie v. American Broadcasting Cos.*, a woman consented to be interviewed by ABC for its investigation, which was to be aired on its weekly "20/20" newsmagazine program. The woman did not, however, agree to appear on camera. Unbeknownst to her, the ABC news crew used a hidden camera and concealed micro-

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subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

...

"(4)(a) ...shall be fined under this title or imprisoned not more than five years, or both."

[11] 18 U.S.C.A. 2511(2)(d): "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

[12] *See, e.g., supra* notes 3-5.

phones and recorders. A segment of the interview appeared in the story. The woman alleged ABC had violated the federal wiretap law. A federal district court dismissed that charge, but an appeals court reinstated it.[40]

The case also raised the issue of whether ABC and Rivera had violated two other FCC regulations not aimed directly at broadcasters. Both regulations prohibit using radio devices to eavesdrop on private conversations without all parties' authorization.[41] The circuit court upheld the district court's decision to dismiss those allegations.[42] This was the only time those regulations have been raised in lawsuits over broadcast newsgathering, and FCC documents contain no record of the commission having to apply either regulation to broadcasters.

The second case the "20/20" investigation spawned might be called *Boddie II*,[43] inasmuch as the circuit court called its predecessor *"Boddie I."*[64] This time, the circuit court majority chose to address the First Amendment:

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[40] Boddie v. Am. Broadcasting Cos., 731 F.2d 333, 338 (6th Cir. 1984).

[41] 47 C.F.R. 2.701:

"(a) No person shall use, either directly or indirectly, a device required to be licensed by section 301 of the Communications Act of 1934, as amended, for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

(b) Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority."

47 C.F.R. 15.11 (whose language now appears in 47 C.F.R. 15.9):

"Except for the operations of law enforcement officers conducted under lawful authority, no person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation."

[42] 731 F.2d at 339.

[43] Boddie v. Am. Broadcasting Cos., 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990).

> At first glance, this case may not appear to be about freedom of expression at all; the wiretapping statute proscribes the non-consensual interception of a communication, not the use of it. But while the statute on its face does not punish the use of communications, as a practical matter it is doubtful "that a tape recording which was never used could form the basis for liability under Section 2511(2)(d) [of the federal wiretap law]." Moreover, from a journalist's point of view, dissemination is the reason for the interception -- and the event that might trigger liability.[65]

The court went on to declare that Section 2511(2)(d) was unconstitutionally vague because of its final clause, which made it unlawful to intercept communications "for the purpose of committing any ... injurious act" other than what that section specified.[66] The court described the "injurious purpose" standard as "amorphous" and argued that, because it gave no clear instruction, it could make journalists fear liability and thus deter investigative reporting.[67] The ruling affirmed the district court's dismissal of the wiretap charge against ABC.

A few cases have involved not federal statute but state eavesdropping or wiretap law. Some of those rulings affect broadcasters; others could be extended to affect them. The leading such case is *Shevin v. Sunbeam Television Corp.,* in which the Florida Supreme Court held a state law requiring all parties to a "wire or oral communication to give prior consent" did not violate the First

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[64] 881 F.2d at 268.

[65] *Id.* at 270, quoting By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 960 (7th Cir. 1982), a case arising from an anti-trust suit.

[66] *Id.* at 271, citing 18 U.S.C.A. 2511(2)(d), *supra* note 58.

[67] *Id.* at 270-71.

Amendment.[68] A federal court in Puerto Rico has upheld a civil privacy claim involving a recording made without consent.[69] Illinois courts have taken a narrower view, declaring that a state law requiring all parties to consent to interception of their communications in non-criminal matters applies only to surreptitious recording by someone not involved in the conversation.[70] And an Oregon court has applied a state statute requiring all parties to consent before anyone may "obtain or attempt to obtain" all or part of an oral communication *not* made by telephone or radio.[71] Such oral communications would include face-to-face conversations.

There is a similar conflict in criminal rulings that could apply to broadcast newsgathering. Courts in Pennsylvania and Alaska have declared or implied that all parties to a communication must consent to the interception of that conversation.[72] A state court in Washington, however, explicitly rejected the Alaska court ruling.[73] And the Vermont Supreme Court has interpreted the state's constitution to allow undercover officers to surreptitiously record face-to-face conversations in public[74] -- but to forbid such recording "in a defendant's home without his consent and without prior court authorization."[75]

Three cases have arisen involving consent matters not related to wiretap law. The signals are, again, mixed. A federal appeals court ruled in *Lal v. C.B.S., Inc.*[16] that it was sufficient for a tenant of rental property to consent to have a television crew enter the property and shoot footage for a story on supposedly bad living conditions there. The property owner, who was not present when the crew asked to enter, had sued for trespass and defamation. But the other two rulings have gone against broadcasters. A Wisconsin court ruled in another trespass and defamation case that a television reporter had no constitutional privilege to trespass into a house where police were investigating reports of gunshots.[17] The reporter had not asked for or been given permission to enter the house; its occupant, whom the reporter filmed, apparently thought the reporter was an officer or deputy. And a district court, focusing on prison rules, not broadcast issues, denied NBC's motion to dismiss an inmate's intrusion lawsuit. The inmate had been videotaped in a prison exercise cage after stating he did not want to be taped.[18]

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[68] 351 So.2d 723, 724 (Fla. 1977), *appeal dismissed,* 435 U.S. 920 (1978).

[69] Menda Biton v. Menda, 796 F.Supp. 631 (D.Puerto Rico 1992).

[70] *See, e.g.*, Thomas v. Pearl, 793 F.Supp. 838 (C.D.Ill. 1992), *aff'd,* 998 F.2d 447 (7th Cir. 1993); People v. Beardsley, 503 N.E.2d 346 (Ill. 1986).

[71] Hirschey v.Menlow, 747 P.2d 402, 404 (Or.App. 1987).

[72] Commonwealth v. McCoy, 275 A.2d 28 (Penn. 1971); State v. Glass, 583 P.2d 872 (Alaska 1978).

[73] State v. Kadoranian, 828 P.2d 45, 48 (Wash.App. 1992).

[74] State v. Brooks, 601 A.2d 963, 965 (Vt. 1991).

[75] State v. Blow, 602 A.2d 552, 556 (Vt. 1991).

Hidden cameras. The federal wiretap statute has also been applied to one hidden camera case. In *Benford v. American Broadcasting Cos.*,[19] a district court refused to dismiss a health insurance agent's claim that ABC had violated the wiretap law by videotaping him without his knowledge. The taping, in which congressional investigators posed as potential clients, was part of the network's coverage of a congressional probe into sales of supplemental health insurance to the elderly.

Although *Benford* did not favor the media, hidden camera cases appear to be the area in which broadcasters have received the most judicial support. The *Boddie* cases, while involving mainly consent and wiretap law, involved ABC's use of a hidden camera to tape Boddie's comments after she had said she did not want to go on camera. That dispute was eventually decided in ABC's favor. ABC also prevailed in a dispute with an Illinois police officer who sued for illegal eavesdropping, under the wiretap statute, and for invasion of privacy.[illegible] He had been filmed without his knowledge in a private room with a lingerie model during an undercover vice investigation. The television crew was in an adjacent room, filming through a two-way mirror for its own probe of suspected police harassment. An Illinois court ruled the officer had no common law right to privacy because he was a public official[illegible] and that a camera, by itself, was not an eavesdropping device.[illegible] In another case, a Missouri court ruled summarily in a TV station's favor on an intrusion claim by an alcohol and drug rehabilitation center where a TV station producer had posed as a patient and carried a hidden camera.[illegible]

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[16] 726 F.2d 97 (3rd Cir. 1984).

[17] Prahl v. Brosamle, 295 N.W.2d 768 (Wis.App. 1980).

[18] Huskey v. Nat'l Broadcasting Co., 632 F.Supp. 1282 (N.D.Ill. 1986).

[19] 502 F.Supp. 1159 (D.Md. 1980), *aff'd without opinion*, 661 F.2d 917 (4th Cir. 1981), *cert. denied*, 454 U.S. 1060 (1981).

One circuit court has raised the issue of prior restraint in a hidden camera case. The court directed a district court to vacate a temporary restraining order that had kept the program "Inside Edition" from broadcasting a tape, made with a hidden camera, of a diet doctor's alleged malpractice. The circuit court held that the doctor did not show the broadcast would have irreparably harmed him and declared that the district court's order

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[illegible] Cassidy v. Am. Broadcasting Cos., 377 N.E.2d 126 (Ill.App. 1978).

[illegible] *Id.* at 131-32.

[illegible] *Id.* at 129.

[illegible] W.C.H. of Waverly v. Meredith Corp., 13 Media L. Rep. 1648 (W.D.Mo. 1986).

constituted a prior restraint.[10]

"Follow-along" stories. Hidden camera disputes can involve consent issues, as the *Boddie* cases demonstrated. Consent can also be a legal issue in a type of story in which the camera is in full view. It is what might be called the "follow-along" story, in which a camera crew accompanies someone on the job. Social workers, government officials, police officers, and firefighters are typical subjects of such stories. Television reporters have come to favor the "follow-along" method in recent years. Documentary-type programs such as "Cops" rely on it.

One Florida case, *Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*, illustrated the resulting legal issue well. The case involved a TV station's coverage of a nighttime law enforcement raid on a controversial private boarding school.[11] The reporter and camera crew had been invited by the law enforcement officers, and affidavits quoted in the court ruling indicated the school staff and some students wanted the cameras off the grounds. The school sued for trespass. A state district court ruled summarily for the TV station, but an appeals court ruled the district court had erred and ordered the case to continue.

> To uphold appellees' assertion that their entry upon appellant's property at the time, manner, and circumstances as reflected by this record was as a *matter of law* sanctioned by "the request of and with the consent of the State Attorney" and within the "common usage and custom in Florida" could well bring to the citizenry of this state the hobnail boots of a nazi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera. In this jurisdiction, a law enforcement officer is not *as a matter of law* endowed with the right or authority

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[10] *In re* King World Productions, Inc., 898 F.2d 56 (6th Cir. 1990).

[11] Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc., 327 So.2d 810 (Fla.App. 1976), *cert. denied*, 340 So.2d 1154 (Fla. 1976).

> to invite people of his choosing to invade private property and participate in a midnight raid of the premises."

Courts in California and New York have also ruled against broadcasters in "follow-along" story disputes. The New York case was a trespass suit resulting from the entry of television crews into a house where animals had been neglected." A Humane Society investigator had invited the crews to accompany him as he entered the house to inspect the interior. The television stations argued that they were entitled to enter the house to cover the story, but the court rejected their arguments in language almost as strong as in the *Green Valley School* opinion.

> If the news media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever [they] chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists."

The California case involved a series of stories about paramedics. In preparing the series, a camera crew followed the paramedics into an apartment where a man had suffered a fatal heart attack." The camera crew never obtained consent but went ahead and videotaped the paramedics trying to revive the victim." The victim's widow and daughter sued for trespass and intrusion, and a state appeals court reversed a trial court's award of summary judgment to the network, holding that the plaintiffs had legitimate causes of

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"*Id.* at 819, citing Fletcher v. Florida Publishing Co., 319 So.2d 100 (Fla.App. 1975).

"Anderson v. WROC-TV, 441 N.Y.Supp.2d 220 (1981).

"*Id.* at 226.

"Miller v. Nat'l Broadcasting Co., 187 Cal.App.3d 1463 (1986).

"A field producer for this series "testified that it was standard practice in the television industry to secure consent before entering someone's home to film, but that he had not considered the necessity for such permission when accompanying paramedics on their rounds." *Id.* at 1475. The producer also testified, however, that normal procedure, apparently for this series, was to film and not to say anything unless someone asked. *Id.* at 1475, n3.

action to sue NBC.

That state court ruling, however, appears to conflict with a federal court's decision in another California case, in which a woman sued CBS after appearing in a segment on the program "Street Stories."[illegible] The segment was about aid for crime victims, and it focused on a social worker who offered victims "emotional support, guidance through the judicial process, and other relevant services."[illegible] The plaintiff, Yolanda Baugh, had been seen by the social worker after Baugh's husband apparently beat her up at their home. A police officer had told Baugh the camera crew, which had followed the social worker into Baugh's home, was from the district attorney's office, and Baugh had allowed the crew to stay but made it clear she did not want to be on television.[illegible]

The court dismissed Baugh's claims of intrusion and trespass,[illegible] and its reasoning seems to reject the argument in *Boddie II* that one does not gather news without meaning to report it.

> In this case, the camera crew acted within the scope of Baugh's consent while they were on the premises. If they exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property and which cannot support a trespass claim.[illegible]

It is worth noting that Baugh did not accuse CBS of violating federal wiretap law, an issue part of *Boddie II* addressed. Because the CBS crew videotaped her speaking with the social worker without gaining consent, Baugh might have been able to raise the question

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[illegible] Baugh v. CBS, Inc., 828 F.Supp. 745 (N.D.Cal. 1993).

[illegible] *Id.* at 750.

[illegible] *Id.* at 752.

[illegible] The court also dismissed Baugh's claims of appropriation, unfair competition, and negligent infliction of emotional distress. It allowed the case to proceed with regard to her claims of disclosure of private facts, fraud, and intentional infliction of emotional distress. *Id.* at 750.

[illegible] *Id.* at 756-57.

of whether the taping was an illegal interception of her communication.

"Ambush" interviews. The least developed area of broadcast newsgathering law involves "ambush" interviews. Only one court has addressed that tactic squarely, but the issues raised made the case one primarily of consent. The case was the third to come out of Geraldo Rivera's "20/20" investigation into an Ohio judge's alleged corruption. It involved a man who arrived at an Akron hotel for what he apparently thought would be a private meeting with his attorney and Rivera. The man claimed that instead, Rivera accosted him in front of the hotel, with cameras and recording equipment in view. The man tried to claim in his suit that ABC and Rivera had violated the federal wiretap law, as the woman had claimed in *Boddie*. The man also alleged ABC and Rivera had violated an Ohio eavesdropping statute that had been repealed by the time the federal appeals court heard the case.[16] But the district court denied his motion to add that count to his lawsuit, arguing that under the circumstances -- outside the hotel, facing cameras -- the man could not have reasonably expected his comments would not be recorded.[17] On appeal, the circuit court held the man had failed to state a cause of action for violating the wiretap law.[18]

Summary

Regardless of the subject matter or the newsgathering method used, the recurring issue in these cases is consent. Courts have made divergent rulings, as the apparent conflict between the state court's ruling in *Miller v. NBC* and the federal court's decision in *Baugh v. CBS* illustrates.[99] It should also be reiterated that courts have rarely ruled on constitutional issues these newsgathering methods raise. They have focused instead on applying statutes[100] or on procedural matters such as whether a plaintiff had a cause of action.[101] *Shevin v. Sunbeam Television Corp.*, in which the Florida Supreme Court held an all-parties-must-consent law did not violate the First Amendment, is perhaps the only exception.[102]

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[16] Brooks v. Am. Broadcasting Cos., 932 F.2d 495, 499 (6th Cir. 1991).

[17] Brooks v. Am. Broadcasting Cos., 737 F.Supp. 431, 436 (N.D. Ohio 1990).

[18] *Brooks*, 932 F.2d 495 (6th Cir. 1991).

One other case is worth noting, for in it a federal appeals court made a declaration that could prove significant if applied to journalists. In *U.S. v. Koyomejian*, the Ninth Circuit Court of Appeals put video surveillance under the regulatory umbrella of the federal wiretap statute.[103] If other courts -- and particularly the FCC -- accept that interpretation and apply it to journalists, broadcast newsgathering could become quite different. Such a doctrine could require any journalist with a camera or a microphone to get consent before taping such things as face-to-face interviews or people at work. State privacy laws protecting such accepted newsgathering methods as photographing people in public would probably limit such a doctrine's reach. But researchers should watch for rulings applying *Koyomejian*.

CONCLUSION

Precious few clear rules exist for broadcast journalists. There has not been enough case law to give radio and television journalists firm guidance, and that may continue until and unless the U.S. Supreme Court takes some cases in this area. Despite the law's spottiness, however, there do appear to be some ground rules.

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[99] Text accompanying *supra* notes 89-95.

[100] *See, e.g., Lal*, 726 F.2d 97; *Cassidy*, 377 N.E.2d 126.

[101] *See, e.g., Boddie I & II.*

[102] 351 So.2d 723 (Fla. 1977), *appeal dismissed*, 435 U.S. 920 (1978).

[103] 946 F.2d 1450, 1453 (9th Cir. 1991).

First, it seems clear that radio and TV reporters must be careful to get consent before recording, especially interviews. The case law on consent is far from complete, but the fact that the courts have not been uniformly on the media's side in consent cases should make radio and television reporters err on the side of caution. That, in and of itself, could have some chilling effect on reporting, as Lyrissa Barnett[104] and the *Boddie II* court[105] have noted. But that may be the price journalists must pay until the case law is more complete. Broadcasters must also remember not only that the FCC requires them to inform people in advance that telephone interviews will be recorded but also that the FCC has showed signs that informing people might really mean getting their consent to be recorded.

Second, the courts appear willing to allow the use of hidden cameras, even though, by definition, they are used without regard for consent. *Boddie I & II*, however, point out a noteworthy exception -- in cases in which hidden cameras are used even after someone makes it clear he or she does not want to be on camera.[106]

Third, there is disagreement about the practice of the "follow-along" story has met with disfavor in most courts that have considered it. The notable exception was in *Baugh*, the only federal court ruling on such a story, in which a district court ruled in the media's favor.[107]

And fourth, we know the least about the law pertaining to "ambush" interviews. Only one case has dealt with such interviews, and that decision had more to do with consent and procedural issues than with that tactic's legal viability.

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[104] Text accompanying *supra* note 44.

[105] Text accompanying *supra* note 67.

[106] *Supra* note 60 and accompanying text.

[107] 828 F.Supp. 745.

The closest thing to a firm rule to come out of this embryonic area of the law is the importance of obtaining consent. Consent has been an issue for the FCC, despite the fact that the word is not in Rule 73.1206, and for courts dealing with each of the four specific issues just summarized. That should come as no surprise; as the case law indicates, most people who complain about how broadcasters have treated them have done so because they did not expect or want to be on the evening news. The use of federal and state wiretap laws to address this issue has given some direction to the law, but not enough for broadcasters to be sure of it. The legal rule book for radio and television reporting is still being written.

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The Privacy Exemptions and Open Government: Narrowing the Public Interest Standard under the FOIA in the Wake of *Reporters Committee*

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The Privacy Exemptions and Open Government: Narrowing the Public Interest Standard Under the FOIA in the Wake of *Reporters Committee*

Introduction

Few would dispute the need for citizens in a democratic society to be able to keep a watchful eye on the activities of their government. One of the chief ways in which citizens -- and their surrogate, the press -- can observe the federal government, as well as individuals who have dealings with government agencies, is through the federal open records law. The statutory right to information contained in federal government records is embodied in the Freedom of Information Act (FOIA).[1]

The basic purpose of the FOIA, passed in 1966, "is to ensure an informed citizenry, vital to the functioning of a democratic society."[2] In accomplishing this, the FOIA promotes "a general philosophy of full agency disclosure"[3] in order to make available the information needed as a "check against corruption and to hold the governors accountable to the governed."[4] Moreover, the FOIA has traditionally been used by journalists, historians, and others to learn about individuals who have come into contact with government in a variety of ways.

The right to disclosure under the FOIA is not absolute, however. The FOIA was an effort by Congress to balance open access to government records with important considerations that included the need for confidentiality of sensitive personal or governmental information. With this in mind, Congress created nine exemptions that allow agencies to withhold information. One of these, Exemption 6, deals specifically with privacy concerns of

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**The authors would like to thank Professor Bill Chamberlin for suggesting the research topic examined herein.

[1] 5 U.S.C. sec. 552 (1988).

[2] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[3] 5 U.S.C. @ 552(e).

[4] 437 U.S. at 242.

individuals. It allows withholding of personnel, medical, or similar files that "would constitute a clearly unwarranted invasion of personal privacy."[5]

To determine whether a record or document may be withheld, courts must balance the privacy interest at stake with the public interest in receiving the information.[6] In 1989, the United States Supreme Court decided a FOIA case that drastically altered earlier conceptions of "public interest." The case, *Department of Justice v. Reporters Committee for Freedom of the Press*,[7] was decided under Exemption 7, the law enforcement privacy exemption, which contains similar wording to Exemption 6. *Reporters Committee* limited the notion of "public interest" under the Act to only that information that illuminated government operations.[8] This new, narrow conception of public interest, as limited only to "what government was up to," alarmed many who saw the new notion as cutting back on the accessibility of government information.

This study will first look at the *Reporters Committee* decision to determine how the Court redefined what constitutes a public interest under the FOIA. Second, it will discuss federal cases following *Reporters Committee* in which agencies argued to import the new public interest standard to cases decided under Exemption 6, the personal privacy exemption. The paper will also examine the few state cases that have considered the new public interest standard. Finally the study will offer conclusions based on these findings and their significance for journalists and others interested in access to government records.

The *Reporters Committee* Decision

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[5] 5 U.S.C. @552(b)(6).

[6] Rubin, P. A. (1990). Applying the Freedom of Information Act's privacy exemption to requests for lists of names and addresses. *Fordham Law Review, 58*, 1033-1050.

[7] 489 U.S. 749 (1989).

[8] Jones, Trine (1991). Collective bargaining in the federal public sector; Disclosing employee names and addresses under Exemption 6 of the Freedom of Information Act. *Michigan Law Review, 89*, 980-1007.

In 1989, the U.S. Supreme Court decided a case that dramatically restricted the notion of public interest under the FOIA. In *Department of Justice v. Reporters Committee for Freedom of the Press,* the Court redefined "public interest" under the FOIA to include only that information that illuminated the activities of government agencies. The new definition substantially restricted information about individuals that would have previously been available under the statute. In *Reporters Committee,* CBS news correspondent and the Reporters Committee for Freedom of the Press filed suit to obtain access to the law enforcement records of one Charles Medico after these records were denied by the FBI.[9] The reporter who sought the records was searching for information about Medico's family business, which was allegedly dominated by organized crime and might have obtained a number of improperly awarded defense contracts through connections with a corrupt congressman. The reporter claimed that Medico's criminal history as compiled by the FBI -- a so-called "rap sheet" -- was a matter of public interest, in part because the Department of Defense and a member of Congress might have had some illicit connection with Medico. The rap sheet sought by the reporter was a compilation of criminal history information from law enforcement agencies across the country, most of which was a matter of public record in the locality where it originated. Generally, rap sheets include arrests, criminal charges, convictions, and incarcerations.

The FBI withheld the rap sheet citing, among other grounds, the FOIA's Exemption 7(c), which exempts "records or information compiled for law enforcement purposes but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of privacy."[10] A federal district court upheld the FBI's denial of the rap sheet, but the U.S. Court of Appeals for the D.C. Circuit reversed the lower court, finding that "an individual's privacy interest in criminal-history information that is a matter of public record was minimal at best."[11]

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[9] 489 U.S. 749 (1989).

[10] 5 U.S.C. 552(b)(7)(C).

The U.S. Supreme Court reversed the D.C. Circuit, holding that the FBI properly withheld the rap sheet under Exemption 7(c). The Court reasoned that an individual's privacy interest in information that was already public in various locations (for example, courthouses and police stations in diverse locations) could still be significant when those records were compiled by computer within one organization -- in this case, the FBI. Citing an interest in "practical obscurity," that is, the privacy-enhancing difficulty a private individual might have in compiling such a history from diverse sources, the Court recognized "the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole."[12]

But a valid privacy interest was only one part of the Exemption 7(c) equation. On the other side, the statute required courts to balance the privacy interest against any public interest in release of the information. In *Reporters Committee*, the Court defined this public interest in a new and limited way. The underlying policy of the FOIA, the court held, involved public scrutiny of government activity, not private activity. Thus, the FOIA's purpose, the Court wrote, "indeed focuses on the citizens' right to be informed about 'what their government is up to.' . . . That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveal little or nothing about an agency's own conduct."[13] If government information did not serve the purpose of illuminating agency activities, it was not, the Court maintained, a matter of "public interest" within the meaning of the FOIA.

The journalists argued that two factors suggested a public interest in Medico's rap sheet. First, Medico was allegedly involved with a corrupt congressman. Second, Medico was an officer of a corporate defense contractor. The Court rejected both arguments by reasoning that

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[11] 489 U.S. at 759.
[12] Id. at 764.
[13] Id. at 773.

Medico's criminal history would not shed any light on his relationship with either the congressman or the Department of Defense. While a rap sheet might be of interest to the public, it was not the "public interest" recognized as the basic purpose of the FOIA. "In other words," the Court wrote, "although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."[14]

Thus, the *Reporters Committee* Court adopted a narrow view of what constituted a valid public interest under the FOIA. The Court's interpretation of public interest was made in the context of an Exemption 7(c) decision, but its language seemed potentially applicable to any FOIA case in which a question of "public interest" arose. Some have argued that *Reporters Committee* 's public interest definition should only apply to cases arising under Exemption 7(c). Since law enforcement records can be especially damaging, courts have consistently found in favor of the government under Exemption 7(c), a result which has not been the case under other exemptions. The legislative history of Exemption 7(c) adds additional support to limiting the Court's ruling to cases involving that exemption. The wording of the exemption was amended in 1986 from shielding records that "would . . . constitute an unwarranted invasion of personal privacy" to shielding records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" in order to lessen the burden on government.[15] The reduction in the privacy showing necessary to withhold records might be read to support a reduced standard on the public interest side of the balance as well. Other courts, however, have since applied the *Reporters Committee* reasoning to Exemption 6 cases, as we shall examine in the next section.[16]

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[14] Id. at 774.
[15] Andrussier, S.E. (1991). The Freedom of Information Act in 1990: More Freedom for the Government, Less Information for the Public. Duke Law Journal, 41, 753-789 at 762.
[16] Andrussier (1991) pp. 761-3.

The tendency of courts to alter the balance between the individual privacy interest and the public interest in government records can be traced through Exemption 6 cases in which courts have followed the reasoning in *Reporters Committee*. These courts followed *Reporters Committee* in narrowing the range of acceptable public interest considerations. In doing so, these courts extended the rule created under Exemption 7(c), the law enforcement privacy exemption, to cases involving Exemption 6, the personal privacy exemption.

FOIA Exemption 6 states that agencies may withhold government records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[17] Most courts that have examined this exemption have found that the term "similar files" refers to government information that relates to identifiable individuals.[18] Exemption 6 and Exemption 7(c) (exempting law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy") clearly contain similar language. However, the relation between the two exemptions is not without ambiguity. The wording of Exemption 6, which includes the word "clearly," suggests that records that fall under it should be more available to the public because the agency must demonstrate a privacy interest of greater magnitude than under Exemption 7. Moreover, the phrase "could reasonably be expected to" in Exemption 7(c) arguably creates an easier threshold for withholding records than the word "would" contained in Exemption 6.

Whatever the differences between the two exemptions, a number of courts have applied the narrowed public interest standard to cases decided under Exemption 6. The U.S. Supreme Court endorsed the approach in its 1991 decision in *Department of State v. Ray*.[19] In *Ray*, the Court declined to order the release of information collected by the State Department about Haitians who had attempted to immigrate to the United States. The State Department had interviewed the Haitians after they were returned to their home country to determine if they were subject to harassment or prosecution after their unsuccessful attempt to leave Haiti. When a Florida lawyer representing Haitians sought the records, he received summaries of the interviews. In compiling the summaries, however, the State Department had removed personal information about the returnees, including names and other identifying information. The trial court and the Eleventh Circuit found that there was a significant public interest in releasing the names so that the returnees could be located and so that the U.S. government's assertions that the returnees were generally unmolested could be subjected to critical scrutiny.

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[17] 5 U.S.C. 552 (b) (6).
[18] See, e.g., New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).
[19] 116 L.Ed.2d 526 (1991).

The Supreme Court agreed with the public interest analysis, but reasoned that "this pubic interest has been adequately served by disclosure of the redacted interview summaries."[20] Interestingly, the *Ray* Court cited *Reporters Committee* and referred to the notion of scrutinizing what government is up to, but nowhere in *Ray* did the Court explicitly state that shedding light on government conduct was the *only* possible basis on which to find a public interest under Exemption 6. The *Ray* Court stated that the "Court of Appeals properly recognized that the public interest in knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees is cognizable under FOIA."[21] However, the Court never clearly stated that public scrutiny of the agency was the exclusive grounds for identifying a public interest in government records. Moreover, limiting the concept of public interest under Exemption 6 was not necessary to the decision in *Ray*, which may relegate any statements in the opinion to that effect to the status of *dicta*.

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[20] Id. at 543. The Court also discussed without deciding the notion of derivative uses of information as raising a public interest issue. In other words, if the information itself did not help inform the public about government conduct, but the information could be used in a way that might do so, should such derivative use be recognized as a valid factor in the public interest analysis? For example, the identities of the deported Haitians revealed nothing about U.S. government conduct, but an investigator with the identities could then track down the Haitians and ask them questions that *could* reveal something about U.S. conduct. For a full discussion of this point, see Sinrod, Eric J. (1993). Blocking Access to Government Information Under the New Personal Privacy Rule, Seton Hall Law Review, 24, 214-233.

[21] Id. at 543.

In 1991 the D.C. Circuit followed *Reporters Committee* in deciding *Reed v. National Labor Relations Board*.[22] In this case, Rex Reed requested lists of employees eligible to vote in union representation elections -- so-called "Excelsior lists." Reed argued that obtaining the list would allow him to correct alleged misrepresentations made by the National Labor Relations Board, which supervises union elections.

The D.C. Circuit, following *Reporters Committee*, said that the purpose of requests was irrelevant under FOIA since disclosure "cannot turn on the purposes for which the request for information is made."[23] As a result, the court stated, the revealing information had to exist in the document itself. With this distinction in mind, the court held that the Excelsior lists would shed no light on the Board's conduct and hence Reed had demonstrated no public interest in their dissemination. Because there was no public interest in the lists, the privacy interests of the employees necessarily prevailed.

The reasoning in the *Reed* decision has important "burden of proof" ramifications. Because the requester's reasons for seeking information have no bearing on public interest, any argument showing how information would be used to discover what the government is up to becomes negligible.[24]

In *New York Times v. NASA*, decided in 1991, a federal district court upheld an Exemption 6 denial based on the absence of a *Reporters Committee* "public interest."[25] In *NASA*, a reporter from the *New York Times* requested recordings of all voice and data communications from the doomed space shuttle Challenger. The reporter had received a transcript of the recorded voices, but insisted the recording might reveal information about the disaster that could be gleaned from inflections in the astronauts' voices and background noises in the cabin. The court allowed NASA to withhold the tapes, deciding that tapes of the

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[22] 927 F.2d 1249 (D.C. Cir. 1991) See also, National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989).
[23] 927 F.2d at 1252 (quoting 109 S.Ct. at 1480).
[24] See generally, Sinrod (1993).
[25] 782 F.Supp. 628 (D.D.C. 1991).

Challenger astronauts' voices in the minutes before the shuttle exploded would shed no light on NASA's operations.

The newspaper argued that the voices of the astronauts and the sounds in the Challenger cabin might reveal whether the astronauts were aware of the impending tragedy. The court rejected this claim, noting that NASA experts had submitted affidavits to the effect that background noises were not present on the tape. Moreover, the court reasoned, assuming "that plaintiff's speculations were true, and that there is some voice inflection or some background noise on the tape which indicates that the astronauts knew they were going to die, this Court cannot see how that information contributes anything to the public's knowledge of how NASA operates."[26] Because the court divined no public interest in the tapes, the privacy interest prevailed.[27]

Plugging the Labor Statue Loophole

At least one line of federal cases since *Reporters Committee* required release of information by interpreting the public interest issue in a less formalistic manner than the cases discussed in the preceding section. However, the cases that have departed from the narrow *Reporters Committee* view of public interest have done so in special circumstances -- when another federal statute was the basis for the requested information.[28] Moreover, a 1994 U.S. Supreme Court case has held that this alternative approach is invalid.

In 1992, the full Third Circuit required release of home addresses of certain federal employees in *FLRA v. Department of the Navy*.[29] The case arose when the Federal Labor

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[26] Id. at 633

[27] The vast majority of federal cases decided under Exemption 6 since *Reporters Committee* have adopted that case's limited view of public interest under the FOIA. See, for example, Oliva v. U.S., 756 F.Supp. 105 (E.D.N.Y. 1991); Schoetlle v. Kemp, 733 F.Supp. 1395 (D. Haw. 1990).

[28] In addition to the cases discussed in this section, see Painting Industry of Hawaii Market Recovery Fund v. Department of the Air Force, 756 F.Supp. 452 (D. Haw. 1990) (citing Davis-Bacon Act compliance as a matter of public interest).

[29] 966 F.2d 747 (3d Cir. 1992).

Relations Authority sued for release of Navy documents listing home addresses of non-union members of a bargaining unit. The decision of the court was complicated by the fact that the case was not a simple FOIA request, but involved a disclosure request under the provisions of the Federal Service Labor-Management Relations Statute.[30] This statute, called the Labor Statute, requires disclosure of information relevant to collective bargaining, but its disclosure provisions are subject to the federal Privacy Act,[31] which in turn is subject to the exemptions of the FOIA. Through this rather complex thicket of statutory construction, the Third Circuit was required to determine whether there was a public interest in the home addresses in question.

The court identified a significant public interest in collective bargaining, explicitly recognized by Congress in the Labor Statute, and stated that the narrowed public interest standard from *Reporters Committee* had to be adjusted in light of the Labor Statute. Because the *Reporters Committee* Court did not evaluate a case involving the public policy concerns advanced by the Labor Statute, the *Reporters Committee* Court's view that matters of public interest were limited only to "what government is up to" could not control the public interest determination in the case before it, the Third Circuit held. The appellate court wrote that "the [Navy's] argument has the anomalous effect of requiring [us] to rule 'clearly unwarranted' under one statute (FOIA) a disclosure that Congress has determined to be clearly warranted under another law. In view of this dysfunction and the statutory public interest in collective bargaining, it is improbable that Congress intended such an incongruous result."[32] As a result, the court ordered the requested information released.

This approach of finding a "public interest" in the Labor Statute was repudiated by the Supreme Court in 1994, however. In *Department of Defense v. FLRA*,[33] the Court rejected any expansion of the public interest standard based on the Labor Statute. In *FLRA*, the Court considered a request by two unions to the Department of Defense for the names and home addresses of federal employees. The DOD provided the names, but withheld the addresses, citing privacy concerns.

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[30] 5 U.S.C.A. @ 7103(a)(16)(1980).
[31] 5 U.S.C.A. @552a.
[32] 966 F.2d at 757.
[33] 114 S.Ct. 1006 (1994).

The Supreme Court, rejecting a contrary decision by the Fifth Circuit, held that *Reporters Committee* established the sole grounds for determining any public interest in the addresses. As a result, the unions could establish only a "negligible" public interest in the employees' addresses, the Court held. "Disclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further 'the citizens right to be informed about what their government is up to.' "[34] That is, the addresses would not shed light on the activities of the DOD.

The Supreme Court rejected any attempt to "read into" the FOIA the Congressional concerns of the Labor Statute. "Nowhere . . . does the Labor Statute amend the FOIA's disclosure requirements or grant information requesters under the Labor Statute special status under the FOIA," the Court wrote.[35] Because the public interest in the addresses was minimal, the privacy interests in the case prevailed.

In an intriguing concurrence, Justice Ginsburg accepted the majority's reasoning, but expressed doubt about the narrowed public interest standard of *Reporters Committee*. Justice Ginsburg's concurrence suggested she was constrained by the principle of *stare decisis* to accept *Reporters Committee* as good law, but that she personally believed that case's public interest standard to be unduly limiting and unwarranted by the language of the FOIA. "I do not agree with the Court," she wrote, "that the *Reporters Committee* rule yielding these anomalies is indubitably commanded by FOIA."[36]

Justice Ginsburg pointed out that the "core purpose" limitation adopted in *Reporters Committee* was not contained in the statutory language of the FOIA. "It is fully consistent with [the FOIA] to judge an invasion of personal privacy as 'warranted,' courts held pre-*Reporters Committee*, even if the disclosure sought is unrelated to informing citizens about Government operations," she wrote.[37] However, the "pull of precedent" made such reasoning impossible after *Reporters Committee*, Justice Ginsburg wrote. She ended her concurrence with a suggestion that Congress revisit the FOIA to correct the Court's flawed interpretation.

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[34] 1994 U.S. LEXIS 1867 at 19, quoting *Reporters Committee*, 489 U.S. at 773.
[35] 1994 U.S. LEXIS 1867 at 21.
[36] 1994 U.S. LEXIS 1867 at 36.

State Cases Considering *Reporters Committee*

In the two reported state cases that have considered *Reporters Committee* as persuasive authority in interpreting state open records law, the reception has been mixed. One court followed the narrowed public interest standard, while the other declined to do so.

In *Healey v. Teachers Retirement System*,[38] an Illinois appellate court upheld denial of records under the Illinois Freedom of Information Act using the narrowed public interest standard. In *Healey*, a teachers union requested information about participants in the Illinois Teachers Retirement System. The Illinois act has a privacy provision -- similar to the federal FOIA's exemption 6 -- that requires a balance between privacy interests and the public interest in disclosure. The Illinois court denied disclosure, noting that "the information the plaintiffs seek says little or nothing about the operation of government."[39] Although *Reporters Committee* was purely persuasive authority in construing the Illinois statute, the appellate court cited it with approval in reaching its decision.

On the other hand, the Ohio Supreme Court rejected a strict application of the narrowed public interest standard in 1992. In *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*,[40] the state high court considered a request for names of donors from a university foundation. The foundation argued, citing *Reporters Committee*, that the donor names would not inform the public about government operations. The Ohio court rejected this approach, reasoning instead that "there is . . . significant public interest in knowing from whom donations come and how that relates to where the university, as a public institution, chooses to spend its money."[41] The court thus rejected a formalistic reading of "public interest" and instead accorded it the broader meaning of "matters of interest to the public."

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[37] 1994 U.S. LEXIS 1867 at 39j.
[38] 558 N.E.2d 766 (Ill. App. 1990).
[39] 558 N.E.2d at 770.
[40] 602 N.E.2d 1159 (Ohio 1992).

Conclusion

The Supreme Court's *Reporters Committee* decision has closed the door on a number of traditional uses of the FOIA. The effect may be particularly felt by journalistic organizations, which have used the FOIA not only because it opened up governmental conduct to scrutiny, but because it assisted in other investigatory functions, including obtaining government records concerning private individuals. While *Reporters Committee* departed from established FOIA assumptions in a number of ways, the notion that "public interest" under the FOIA is limited to government records that would reveal something about the operations or conduct of government agencies has had a profound impact. That impact has been felt not only in Exemption 7 (c) cases, but in Exemption 6 cases as well.

The majority of Exemption 6 cases decided since *Reporters Committee* have applied the narrowed public interest standard. Those cases include the Supreme Court's decision in *Ray* which, while equivocal, lends support to the narrow standard. A few cases have invoked a public interest in collective bargaining as a separate cognizable public interest, but those cases have since been repudiated by the Supreme Court. Of two state court decisions considering *Reporters Committee* in interpreting their own statutes, one has followed the Supreme Court and one has rejected the narrowed conception of public interest.

One commentator has suggested that the *Reporters Committee* decision can be read as applying only to Exemption 7(c) cases, which involve particularly sensitive information regarding individuals' involvement with law enforcement and therefore arguably should

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[41] 602 N.E.2d at 1163.

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receive greater protection.[42] In practice, however, the narrowed public interest standard has been imported into Exemption 6 cases with a vengeance.

The new public interest standard bodes ill for journalists and others who seek government records in any broader context than simply observing how agencies operate. As Judge Patricia Wald of the D.C. Circuit has pointed out, the *Reporters Committee* view of public interest "resulted in a ruling that effectively shut out many traditional historical and reportorial uses of FOIA."[43] While the text of the FOIA exemptions -- and particularly that of Exemption 6 -- does not necessarily lend support to the *Reporters Committee* approach, the Court's crabbed view of public interest is the law unless and until Congress acts to clarify its intent.

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[42] See generally Andrussier (1991) at 761-765 (also noting argument to the contrary).
[43] Wald, Patricia M. (1992) . . . Doctor, lawyer, merchant, chief, George Washington Law Review, 60, 1127 at 1148.

Abstract

The Privacy Exemptions and Open Government: Narrowing the Public Interest Standard under the FOIA in the Wake of *Reporters Committee*

Matthew D. Bunker and Stephen D. Perry, University of Alabama

A paper presented to the Law Division, AEJMC 1994 annual convention, Atlanta, Georgia

The federal Freedom of Information Act is one of the most important means journalists and others have of obtaining government records. Recently, however, the U.S. Supreme Court has limited that access by defining "public interest" under the FOIA in a particularly narrow manner. This paper examines federal and state court cases that have grappled with the new, narrow definition of public interest in the context of the FOIA's personal privacy exemptions and similar state open records laws.

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FEMINISM AND FREE EXPRESSION: SILENCE AND VOICE

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DRAFT

FEMINISM AND FREE EXPRESSION: SILENCE AND VOICE

By Robert Jensen and Elvia R. Arriola

> After what happened all those years ago, I wonder if I'll ever live free again.

Those words, posted on a "survivors' wall"[1] on a university campus by a woman who was raped, raise critical questions about what it means to be free and live free in our society and how well the notion of freedom of expression works for members of oppressed groups. In this essay, we suggest that dominant First Amendment theory regarding free expression is not very good theory because in practice it does little to promote the expression of the people who most need to find their voices; if an idea is said to be good in theory but not in practice, then it's not really a good theory.[2]

From a feminist perspective, women's lives--and particularly sexual-abuse survivors' lives--highlight this gap between free-expression theory and practice. In theory, the woman who posted those words on the survivors' wall is free: She is a citizen of what we call a free country, with at least some freedom to move and work where she pleases, with the certain rights said to guarantee the freedom to express herself in whatever way she chooses. Her posting--telling her story and naming its legacy--might be seen as an exercise of the First Amendment's guarantees of free speech and press that are intended to contribute to living free lives. But this survivor's speech act is hardly a success story of the American political system's procedures and rules, which grant her specific freedoms by law but do not necessarily operate to foster those freedoms. Her posting takes place within an historical and cultural context in which the vast majority of survivors of sexual violence are ignored, blamed, pathologized, threatened, disbelieved, and otherwise revictimized when they protest the violation and try to hold their offenders accountable.

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[1] As feminist critiques of sexual violence have made inroads in our culture, an increasing number of survivors of those assaults are finding a voice to speak about the abuse. One of the places that has happened is on "survivors' walls," typically on college campuses. These are simple bulletin boards on which survivors can post written accounts of their attacks and their reactions to them. Those accounts range from detailed descriptions of rape and incest, to analyses of the attacks, to calls for political action.

[2] See Catharine A. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" Yale Journal of Law and Feminism, 4:1 (Fall 1991): 13-22.

Current statistics suggest that in the United States, at least one of four women will be raped in her lifetime,[3] one of three women is a victim of childhood sexual abuse (usually by a family member or trusted adult),[4] and countless millions of women are subjected to sexual harassment at school, in the workplace, in the marketplace, and on the streets.[5] With this level of sexual violence--described by one of the leading rape researchers as "a scourge, if not an epidemic"[6]--questions, made concrete here in the voice of a rape survivor, emerge: What does freedom mean? What sociopolitical, legal, historical, and psychological factors would lead a survivor of sexual violence to fear that her freedom had been permanently compromised? Is her fear of not ever living "free again" a sign of her own pathology or of deeply rooted societal problems? What is there about the experience of sexual violence that calls a woman's freedom into question not only for the discrete time period of the violation but also, seemingly, for the rest of her life? Is there, in fact, something about our sexually violent culture that threatens the freedom of all women, survivors and non-survivors alike? Finally, does the general freedom of others to portray a woman as a natural victim of men's natural sexual aggressiveness increase women's chances of being victimized?

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[3] Diana E. H. Russell, "The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females," Victimology, 7 (1982): 81-9; and Allan Griswold Johnson, "On the Prevalence of Rape in the United States," Signs, 6:1 (Autumn 1980): 145. For an overview of the problem, see Mary Koss and Mary R. Harvey, The Rape Victim: Clinical and Community Interventions, 2nd ed. (Newbury Park, CA: Sage, 1991).

[4] Long a neglected research subject, scholars are beginning to investigate incest. For a clear and compelling account of the problem, see Judith Lewis Herman, Trauma and Recovery (New York: Basic Books, 1992); Ellen Bass and Laura Davis, The Courage to Heal, rev. ed. (New York: Harper/Perennial, 1992).

[5] Amber C. Sumrall and Dena Taylor, eds., Sexual Harassment: Women Speak Out (Freedom, CA: Crossing Press, 1992); Michele A.

These questions about the relationship between freedom, social location, and lived experiences are essential to further questions about the exercise of power and voice in this society. Power, privilege, and oppression play a key role not only in the quality of life of different members of our society but also in the strength, credibility, and resonance of voice. Thus, it is our view that any analysis of freedom of expression must attend

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Paludi and Richard B. Barickman, Academic and Workplace Sexual Harassment: A Resource Manual (Albany: SUNY Press, 1991).

[6] Mary Koss, "The Women's Mental Health Research Agenda: Violence Against Women," American Psychologist, 45:3 (March 1990): 375.

to the power relations of diverse men and women as they manifest themselves in their everyday lives.

In essence, we ask: What if traditional First Amendment law protects the freedoms of some, but constricts society's ability to recognize the common suppression of others' expression? What if First Amendment theory helps create the illusion of "free speech" in a society where so many know or believe that they cannot speak freely?

FEMINIST THEORY, THE LAW, AND SEXUAL VIOLENCE

This article challenges several underpinnings of Anglo-American law and justice. We join, with added commentary, the critiques in other essays in this volume of these philosophical positions--such as the public-private dichotomy, law's assertion of objectivity, the quest for allegedly neutral principles, and individualism.

The traditional liberal view that has influenced law and social policy-making is that justice will emerge through neutral, objective rules and processes that avoid partiality. We reject the notion that law is neutral in any sense. Laws are made and enforced based on assumptions and definitions that are the product of human choices and, hence, politically charged. The prevailing cultural myth is that people with power shape neither law-making nor judicial decision-making; consequently, judicial forums beckon the people to resolve their conflicts before impartial and neutral judges. The problem, of course, is that this notion of principled jurisprudence does nothing to aid those people who are displaced in the existing power structure; such people are invisible to those who build and maintain these "impartial" forums.

The history of Anglo-American law is a history of the privileging of the perspective of white heterosexual men of the upper classes and the corresponding exclusion of outsiders to the power structure, such as women, non-whites, and lesbians and gays. Consequently, in the liberal dichotomy between universal principles and individual preferences the experiences of the powerful are cast as "universal principles," while experiences of the marginalized citizen are inevitably characterized as individual preference or egregious whim. So, the question is not whether individual experience and perceptions--which are rooted in one's class, race, gender, and sexual identities--will shape the law, but *whose* experiences count and how honest the system will be about that fact.

Because free-expression law is even more explicitly rooted in the myth of objectivity and neutrality, a critical approach is even more crucial. Accepting current free-speech law doctrine, which centers on governmental non-interference, requires denying that the government and legal system are inextricably involved in the structuring of both the public and private worlds. In practice, this obfuscation means that free-expression doctrine is part of a system that helps maintain the status quo; those who have power continue to have the greatest opportunities to speak in an effective manner. From that assertion, which is adequately defended in greater detail both in this volume and in more than

50 years of critical legal scholarship, we turn to the feminist critique supporting this and other critical claims of how traditional free-expression law silences the disempowered.

Feminist theorizing challenges any definition of freedom which holds that an agent acts freely if her actions are perceived as voluntary and if she can choose between available options. Marilyn Frye argues that women in this culture are oppressed by a "systematic network of forces and barriers that tend to the reduction, immobilization and molding of the oppressed."[7] Such forces are neither accidental nor occasional, and women can't simply avoid them; rather, women's lives are caged in.[8] Like Frye's metaphor of a bird caught in a bird cage, oppressed people can mistakenly focus on the one wire that seems to entrap them--the wire they need only fly around to be free--rather than to step back and grasp the larger systemic and structural forces that shape, restrict, and confine their lives. On this view, freedom is not sufficiently understood by merely referring to discrete moments in time or even to specific situations, but must be both contextualized and historicized. Returning to the example of a rape survivor, the question nags: If a rape survivor truly had expressive freedom, why would she have to resort to posting a statement on an anonymous wall? What forces in legal and social systems restrict a survivor to a bulletin board to protest her violation and express her despair, pain, and outrage? The answer to this question lies in a feminist conception of a patriarchal system that *legitimates* sexual violence against women by its own legal practices.

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[7] Marilyn Frye, The Politics of Reality (Freedom, CA: Crossing Press, 1983), 59.

[8] Ibid., 4.

The common wisdom is that rape, incest, and other forms of sexual abuse are difficult for the legal system to control because of inherent difficulties in proving that an unwanted attack took place. Because of that, and the companion phenomenon of victim-blaming, in the United States only 2 percent of intrafamilial child sexual abuse, 6 percent of extrafamilial sexual abuse, and 5 to 8 percent of adult sex assault cases are reported to police.[9] This state of affairs is the predictable result of a legal system that is patriarchal both in the means and ends toward which it works. The "problems" in prosecuting rape are rooted not in unavoidable difficulties of proving a case but in the systematic devaluation of women and children in the culture. That status has usually rendered them either unreliable witnesses to their own violation or even contributors to the injuries inflicted upon them.[10] When it operates most efficiently, a patriarchal system suppresses the victim's ability even to name the violation and allows the mostly male perpetrators to avoid sanctions in most cases. Sexual assault--and society's typical response to it--makes it clear that a patriarchal culture can see itself as fair, just, and well-meaning in the face of systematic brutality and institutionalized disregard for women and children. This may appear as a strong statement, but in response we must ask: How could a society allow the documented levels of sexual abuse of women and children if it did not, at some level, have contempt for the victims?

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[9] Koss, "The Women's Mental Health Research Agenda," 375.

[10] For a discussion of how this plays out in the courtroom, see Alice Vachss' compelling account of her experience as a rape prosecutor, Sex Crimes (New York: Random House, 1993). For a British perspective, see Sue Lees, "Judicial Rape," Women's Studies International Forum, 16:1 (1993): 11-36, in which she describes the way rape survivors are put on trial during the prosecution of rapists.

A FEMINIST APPROACH TO WOMEN'S OPPRESSION BY SILENCING

Part of what it means to be oppressed is to be silenced. Anyone can be silenced as a result of trying to protest injustices, correct distortions, name injuries, tell one's own story, and participate fully in the construction of knowledge. Silencing members of oppressed groups, however, can work in subtle and insidious ways; oppressed people are discouraged, mocked, shamed, and simply ignored, as well as explicitly punished for speaking out when their voices do not support the status quo. And they are silenced when theorists, researchers, thinkers, lawmakers, and citizens generalize about human "truths" from a position that logically and psychologically excludes them.

Feminist theorizing helps us define and explore how various systems of oppression interact and support one another so as to continually recreate hegemonic power relations among different groups, in particular between women and men. Although there are different theories within feminism, some central tenets emerge. Jane Flax, for example, identifies three assumptions common to feminist theory: *(1)* that women's experiences are different from men's experiences; *(2)* that women's oppression is a unique set of social problems that is not to be understood as merely a subset of some other social structure; and *(3)* that women's oppression is not just a matter of "bad attitudes" but of the way the world is organized.[11]

Ruth Ginzberg suggests that *survival* is the issue and that, theory-making must place the survival of women at the center:

> Women must constantly concern ourselves with how to survive batterings, rapes, wars and other violence, racism, homophobia, depression, mother-blaming, poverty, hatred, isolation, silencing, rupturing of our communities, exhaustion, spiritual co-optation, conceptions of health that view us as diseased in ways that we are not and that do not address or even acknowledge our actual suffering, indoctrination in patriarchal thinking in the place of genuine education, demands on us to do more than our share of the work of the world, trivialization of our knowledge, and destruction of those things that are beautiful and that nourish our souls. None of these things is of our own doing. They are the results, and evidence, of our oppression. In one way or another, we often find ourselves not knowing whether, or how, we will survive. When we do survive, we often suffer survivors' guilt.[12]

Broadly construing Ginzberg's argument, we might say that good feminist theory affirms women's lives and experiences, in particular their critical need to survive. "The nature of oppression," Ginzberg writes, "is such that no form of survival is assured to those who are oppressed."[13] Feminist theory, then, places the survival of women at its center.

Because of certain perceived differences between males and females, women's lives have been and continue to be ruled by masculinist ideology and its material reality. Feminism asks that men, both as individuals and as a class, be held accountable for their actions. Women are not oppressed by a mysterious force, or because of some innate feature or flaw within themselves. Women are oppressed by a system of gender rules and roles and a distribution of power created to benefit men and to maintain men, either through conscious efforts or, more commonly, by refusing to acknowledge or challenge male privilege and patriarchal structures and values. Given the material conditions of women's lives in the United States, including their economic, legal, social, and political status, it is uncontroverted that women as a class are systematically subordinated, constrained, confined, devalued, and deprived of equal treatment.

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[11] Jane Flax, "Women Do Theory," in Marilyn Pearsall, ed., Women and Values (Belmont, CA: Wadsworth, 1993) 4.

[12] Ruth Ginzberg, "Philosphy is Not a Luxury," in Claudia Card, ed., Feminist Ethics (Lawrence: University of Kansas Press, 1991) 130.

[13] Ibid,127.

History abounds with examples of the silencing of specific women and ways in which that silencing contributes to the oppression of women as a class. However, while the oppression of women is not merely a subset of other social relationships, issues of oppression cannot simply be reduced to an analysis of the ways in which men oppress women. Gender does not arise naturally as the most salient and essential feature of the self or of oppression, but is one aspect among many that comprise our identity. In its broadest sense, "gender" is an analytic category that serves to organize relations of power among people, just as is, for example, race. Oppression affects different women in different ways, always infected by race, class, sexual orientation, ethnicity, and other relevant factors that operate within a complex network of power relations. Gender oppression should not be subsumed under other categories, but neither should it be viewed as the most important, most widespread, or most harmful kind of oppression. It is best to think of these sites of oppression as constituting a web; when a woman is oppressed as a woman, for example, those actions pull on race and other relevant categories, which affect the gender oppression. Gender oppression, although one central aspect of feminism, is intricately bound up with race, class, ethnic, and sexual oppression.

It is also important to remember that while the oppression of women is at the hands of men, masculinity is marked with hierarchies as well. Men oppress other men along the axes of class, race, and other factors. For men and women, any thorough discussion of "who oppresses whom" must take into account each person's race, class, sexual orientation, ethnicity, bodily abilities, etc.[14]

Diversity among women presents both theoretical and practical political difficulties within feminism. Much feminist work has been criticized for being dominated by white middle-class women, thus perpetuating hegemonic power structures. One manifestation of this domination--as bell hooks, Elizabeth Spelman, and others have argued--takes the form of feminist theorizing that is done from a perspective of universalizing white feminists' voice.[15] Such universalizing erases important differences among women and distorts theories of alleged liberation. By erasing differences and falsifying or distorting some women's experiences, feminist theorists effectively silence those whose voices are less powerful than theirs. The goal of shaping a liberatory system of freedom of expression thus requires us to find ways in which citizens and free moral agents can use and experience the power of their voices.

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[14] Arriola, "Gendered Inequality: Lesbians, Gays and Feminist Legal Theory, 9 Berkeley Women's Law Journal 103 (1994)
[15] bell hooks, Feminist Theory: From Margin to Center (Boston: South End Press, 1984); and Elizabeth V. Spelman, Inessential Women (Boston: Beacon, 1988).

To silence the voices of the marginalized is inconsistent with any notion of freedom. The concept of free expression is incomplete without a liberatory element, that is, a recognition that oppressive silencing is distributed in this society unequally and unjustly. Oppression--the act of reducing another's will to one's own and usurping another's autonomy and agency based on one's perceived differences or group membership---calls for both resistance and change. Given the legal, social and political power structure of our society, one can assume *in theory* that anyone who needs or wants liberation can and should express their outrage at the harms inflicted by an unjust system. *In practice*, however, many do not share the power, privilege or right of the mostly white men in this society who have traditionally used the law to protect their own interests. Our concern then, is to see whether current methods of ensuring "free-speech" actually create the needed space for the members of oppressed groups to articulate their experiences and have them addressed.

As noted earlier, the continued domination of powerful voices is a problem within feminism as well as in society overall. In working to become more inclusive in feminist circles, both thinkers and activists have raised critical questions about voice and experience. As Maria Lugones states:

> Feminism is, among other things, a response to the fact that women either have been left out of, or included in demeaning and disfiguring ways in what has been an almost exclusively male account of the world. And so while part of what feminists want and demand for women is the right to move and to act in accordance with our own wills and not against them, another part is the desire and insistence that we give our own accounts of these movements and actions. For it matters to us what is said about us, who says it, and to whom it is said: having the opportunity to talk about one's life, to give an account of it, to interpret it, is integral to leading that life rather than being led through it. . . . We can't separate lives from the accounts given of them; the articulation of our experience is part of our experience.[16]

As variously positioned in relation to power, privilege, and oppression, then, we must learn how to attend to the lived experiences of one another. Consciousness-raising is one way people "can emerge from the unthinkable (silence) to an alternative conception of the world (voice)."[17] Consciousness-raising, understood as "collective critical reconstitution of the meaning of women's social experience, as women live through it,"[18] is a distinctive aspect of feminist methodology. But, as we suggested above, the process of "women telling their stories" is not politically neutral: Women do not come together as equals but as situated selves where power relations play out along various dimensions. It is crucial for an oppressed person's voice and experience to be given play and expression in her own space and context, within her own world, and not be usurped and colonized by dominant persons and groups; altering the most subtle of power dynamics can transform inequalities of voice, and ultimately transform the material conditions of marginalized groups.

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[16] Maria Lugones and Elizabeth Spelman, "Have We Got a Theory for You!, Feminist Theory, Cultural Imperialism and the Demand for 'the Woman's Voice,'" in Women and Values, 19.
[17] Margaret Jane Radin, "The Pragmatist and the Feminist," in Patricia Smith, ed., Feminist Jurisprudence (New York: Oxford, 1993), 569.
[18] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory," Signs, 7:3 (Spring 1982): 543.

Attending to the particularities of various diverse women's lives is a complex and destabilizing task for feminist theorists. One of the more critical questions feminists face is the extent to which we can generalize about women-as-a-class at all. Some feminists suggest we avoid oppressive, totalizing generalizations by practicing "pattern perception" in order to open up inquiry and generate new meaning.[19] The goal is to allow the generalizations that theory and politics require, without giving in to reductionism and totalitarianism, which can only come with a commitment to seeing patterns rather than drawing final conclusions. Mari Matsuda has expressed a similar hope:

> Complexity is not the same as chaos. No two snowflakes are alike, but when it is snowing, it is cold outside. There are parallels and intersections in the maze of complex structures that are the human condition. Knowing one structure of subordination makes it easier to know another. We are not the same. But we are not so different that we are bereft of the chances of knowing anything at all about one another and thereby about ourselves.[20]

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[19] Marilyn Frye, "The Possibility of Feminist Theory," in Deborah L. Rhode, ed., Theoretical Perspectives on Sexual Difference (New Haven: Yale University Press, 1990) 174-184.

[20] Mari Matsuda, "Pragmatism Modified and the False Consciousness Problem," Southern California Law Review, 63:6 (September 1990): 1776-1777.

Categories need to be "explicitly tentative, relational, and unstable."[21] Furthermore, we need humility in theorizing. This approach is an exercise in negotiating the terrain between a naive foundationalism and a politically debilitating postmodernism. Traditional approaches to the law generally ignore this need for humility, routinely generalizing in ways that wipe out important differences in the distribution of power in this society, equating for example,the free-speech concerns of a corporation with that of the individual.[22] Again, we approach this issue with a focus on the realities of power in society and a sensitivity to the way in which theorizing, including feminist theorizing, can overgeneralize.

THE SURVIVORS' WALL:

Sexuality is one of the most important sites of men's oppression of women, where the dynamic of male domination and female subordination is eroticized. The eroticization of power most often occurs in the form of male domination over women, but it also emerges as a dynamic in many relationships, heterosexual or same-sex, where one party is vulnerable because of physical or mental disability, relative lack of knowledge, or age. Our focus here is on female survivors of male violence.

The feminist view of rape and sexual violence rejects the myth that sexual abuse is only committed by deviant men. Rape, incest, and battering are, in an important sense, political acts, individual expressions of institutional woman-hating. Far from deviant, they are in fact the norm; sexual violence and harassment occur so frequently that the majority of women experience such abuse at least once in their lives, and such violence is in sync with, not a deviation from, masculinist conceptions of sex and gender relations. As Wendy Stock points out:

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[21] Angela P. Harris, "Race and Essentialism in Feminist Legal Theory," Stanford Law Review, 42:3 (Feruary 1990): 586.

[22] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

> [R]ape is not only the result of uncontrolled lust, exaggerated gender role behavior, miscommunication, or a misguided desire for physical intimacy. These factors do not sufficiently explain why rape occurs when alternative sexual outlets are always available, including masturbation, when aggression could be exhibited by a nonsexual attack, or where direct communication by the woman is often ignored, not misunderstood by the rapist. Rather, rape and other forms of sexual coercion can be viewed as both the expression and confirmation of male power, dominance, and control of women.[23]

This perspective informs the free-expression issues involved in the survivors' wall. At first blush, it may seem like a somewhat eccentric case study for exploring a new theoretical approach to speech. But the routineness of patriarchal sexual violence and the power of that violence to silence survivors compels us to account for it in a free-expression theory. Also, this focus makes clear the need to place free-expression theorizing in a context of the structure of power in this society and the limits of liberalism. This perspective does not guarantee simple answers to the questions we pose. In fact, we find ourselves struggling to find workable solutions. One of the appealing qualities of conventional 20th-century liberal free-speech theory is its simplicity and apparently seamless quality: free speech simply is allowing all to speak. A critical reconstruction of free-speech doctrine is far messier and less reassuring, and we see no reason to pretend that the approach we endorse is simple.

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[23] Wendy Stock, "Feminist Explanations: Male Power, Hostility, and Sexual Coercion," in Elizabeth Grauerholz and Mary A. Koralewski, eds., Sexual Coercion: A Sourcebook on Its Nature, Causes, and Prevention (Lexington, Mass.: Lexington Books, 1991) 62.

On the surface, the survivors' wall seems to bolster the case for liberal free-expression doctrine. In response to requests for space for expression, a government agency (a state-funded university) provides part of a public commons reserved as a free-speech area for a group that seeks a voice. The state does not censor the content of the board, and anyone who chooses to read it may stop and engage the material. Women's accounts of sexual assaults against them have long been suppressed, and the creation of spaces for their expression is an act of resistance to patriarchy. The forum benefits a number of people: The women who post the writings have a channel to speak. Some women who are survivors may stop to read the wall and may find comfort and support in the writings. Men who have little understanding of the effects of rape have the chance to stop, read, and learn.

At that level, the wall is a success. Liberalism works. Free-speech ideology is vindicated. But under those same liberal rules, that board creates some problems and fails to address others.

Content Neutrality

One of the central tenets of the liberal free-speech paradigm is content neutrality, the idea that the government cannot target for suppression particular views.[24] A number of Supreme Court decisions have set forth this doctrine, warning that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[25] Under that theory, Nazis must be allowed to march in a predominantly Jewish suburb,[26] and misogynist pornography is protected as the expression of a political idea.[27]

But, what if a man who believes feminists have concocted rape stories to punish men for their natural, healthy sexual aggression presses his right to post a misogynist diatribe against women on the survivors' wall, or demands space next to that board for a "persecuted perpetrators" wall? Should the doctrine of content neutrality in public forums be applied to guarantee his ability to post such a notice? From the liberal view, such a concession is acceptable, even beneficial. In the "marketplace of ideas," all ideas are allowed in without judgment, so the story goes. But, what if the posting of such writings by men silences even one survivor? Some women might respond by posting critiques of the men; the attacks by men might actually push women who would not have written to write. The more likely result is that such an attack on the victim's cry would silence other women who already feel hesitant about writing. It could make some women and men reluctant to read the survivors' wall. It is not difficult to imagine a representative of the men's rights point of view using that bulletin board to exercise *his* First Amendment right to criticize or politely denigrate women who post writings on survivors' walls and people who stop to read them.

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[24] First Amendment doctrine has long allowed, of course, the establishment of *categories* of speech that can be regulated or suppressed, such as obscenity and commercial speech. These regulations are not seen as violations of content neutrality because they do not discriminate on the basis of viewpoint; all obscene speech, for example, can be sanctioned, not just obscene speech that takes a certain point of view. This is not to say that we are supporters of absolute protection for either of those categories, but is meant only to point out the semantic game being played.

[25] *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). For variations on this, see *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *Frisby v. Schultz*, 108 S. Ct. 2495 (1988); *Boos v. Barry*, 108 S. Ct. 1157 (1988); *Carey v. Brown*, 447 U.S. 455 (1980); *Heffron v. International Society for Krisna Consciousness*, 452 U.S. 640 (1980); and *Cohen v. California*, 403 U.S. 15 (1971).

[26] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert denied* 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978).

[27] *American Booksellers Association v. William H. Hudnut,* 771 F.2d 323 (7th Cir. 1985); *reh'g denied*, 106 S. Ct. 1664 (1986).

The traditional liberal response to this kind of problem is the "more speech" solution. Justice Louis Brandeis' suggestion that the remedy for harms is "more speech, not enforced silence,"[28] has become a key tenet of liberal free-speech ideology. But when the playing field is decidedly not level -- when cultural myths and stereotypes about women reinforce male domination and female victimization -- then "free speech" is unlikely to lead to a situation in which all speak freely. Survivors and perpetrators don't enter the conversation with equal power; indeed, if we lived in such an egalitarian world, sexual assault would not be the problem that it is. Appeals for "neutrality" cannot deal with a phenomenon in which power imbalances are eminently clear. If the goal is government neutrality, or collective impartiality, we need to ask: What does it say about a society that seeks to be impartial in a dispute between rapist and survivor?

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[28] Whitney v. California, 274 U.S. 357, 377 (1972).

This is not an argument for the wholesale silencing of men, perpetrators or non-feminists. The point is to highlight how traditional First Amendment doctrine cannot deal with a relatively simple case in which members of an oppressed group seek some sliver of space to name the violence the culture encourages. Given the realities of power in the culture, government non-interference in expression by perpetrators and survivors may in fact bolster the power of perpetrators. We believe there is little damage done to the psychological or political interests of an anti-feminist, in limiting his "free speech" by restricting his ability to confront survivors face-to-face, or message-to-message. But even that small effort would likely be deemed unconstitutional to a Supreme Court that has declared:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.[29]

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[29] See First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-791 (1978), quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

Defamation

Another problem arises when women choose to name their abusers. This has been an issue not so much with survivors' walls, but with campus bathroom walls and fliers, where women have publicized the names of men who have raped them. This guerrilla tactic has been the result of women's frustration with campus and criminal justice procedures that inadequately respond to the problem of rape, especially date or acquaintance rape. When those names get posted, officials quickly wipe them clean. At Oberlin College, for example, administrators tried to locate the people who put up posters identifying an alleged date-rapist, with the goal of punishing them. The right of free-speech is constrained by concerns for defamation, and the survivors are trapped. A legal system that refuses to see rape as a serious crime also cuts off the survivors' chance to express their anger at the system and the perpetrator in the name of protecting the reputation of the accused.[30] Such results are not surprising given libel law's roots in a concern for "protecting the best men."[31] So long as the perpetrator has not been convicted of a crime, the presumption of innocence silences the survivor trying to name the crime.[32]

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[30] See Bingham v. Struve, 184 A.D.2d 85, 20 Med. L. Rptr. 2266 (N.Y. App. Div. 1992), in which a preliminary injunction was granted against a libel defendant who picketed in front of the plaintiff's apartment. After A. Walker Bingham sued in libel plaintiff for calling him a rapist, Catherine Struve picketed outside his apartment, carrying a sign that read "Atttention residents of 19 East 72nd St. A Walker Bingham raped me and is now suing me for libel." Struve was seeking an apology from Bingham for a date rape committed in the 1950s, which Bingham alleged was consensual sex. When the libel suit failed to silence Struve, Bingham sought the injunction. While the circumstances of this case are unusual, it is hard to justify the court's abandonment of a central principle of modern First Amendment jurisprudence -- the doctrine that one cannot enjoin a libel, laid down in Near v. Minnesota, 283 U.S. 697 (1931).

A case study of how this can work: In the 1980s, the group Women Against Rape (WAR) -- a volunteer feminist collective that provided counseling services for rape survivors and engaged in political action in Santa Cruz, California -- published fliers in which women could publicly name their rapists, even if the survivor had not reported the rape to police. When Steve Carney's name appeared in a 1984 flier under the heading "Assault/Attempted Rape," he sued the organization and the woman who accused him for libel, invasion of privacy, and intentional infliction of emotional distress. Carney and the woman, who countersued him for assault and battery and emotional distress, settled out of court. The case against WAR proceeded, and the jury awarded Carney $7,500 in compensatory and $25,000 in punitive damages. The appeals court overturned the verdict on procedural grounds and remanded the case for further proceedings.[33]

The case ended with an agreement that Carney would not refile the suit and WAR would not seek the attorneys' fees from

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[31] Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill: University of North Carolina Press, 1986).

[32] Martha McCluskey describes how this rule barred her from speaking about fraternity violence against women on a public radio station. See McCluskey's "Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case," Maine Law Review, 44:2 (1992) 310.

[33] Carney v. Santa Cruz Women Against Rape, 221 Cal.App.3d 1009, 271 Cal.Rptr. 30, 18 Med. L. Rptr. 1123 (6th Cal. Dist. Ct. App. 1990).

Carney that the appeals court awarded. Independent of that settlement, WAR stopped producing the fliers naming assailants. WAR's attorneys advised the group that while it likely could offer a successful First Amendment defense if sued, the women who provided the information would be vulnerable to damage awards. Because the goal of WAR was to give women options, not subject them to further harm, the group decided to stop the flier campaign.[34] The group's intent was to use speech not to punish men but to help women protect themselves, but the simple assertion of "our right to talk about what's going on for us"[35] was undercut by First Amendment doctrine.

We know of no research that has charted how often libel suits and threats are used against survivors, but the WAR case is clearly not unique. For example, in Boulder, Colorado, in the late 1980s, two such suits were filed by men against the women who accused them of rape, with the rape survivors filing counterclaims. In one of those cases, prosecutors did not file criminal charges, and the civil suit resulted in a default judgment against the rape victim, who chose to return to her native Indonesia. In the other, the man was acquitted of the criminal charge, after which the man and woman agreed to a dismissal of the civil case.[36] In a slightly different context, but with the same effect, men accused of sexual harassment have learned that suing the woman who files the complaint is an effective strategy for silencing.[37] At least one man has successfully used a malpractice lawsuit against his daughter's therapists to counter claims of incest.[38]

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[34] Personal communication between Robert Jensen and Jan Shirchild, former member of the WAR collective, January 25, 1994. Shirchild said the disbanding of the group in 1992 was the result not of the lawsuit or financial problems, but because of the dissipating energy of volunteers.

[35] "Keeping Ourselves Safe," interview with WAR members, Matrix (monthly women's publication in Santa Cruz), July 1987, 3.

[36] Mike O'Keeffe, "Running Scared," Westword (Boulder alternative weekly), November 29, 1989, 10-19; and personal

All of this takes place, of course, in a culture that has a notoriously difficult time defining rape and other forms of sexual violence and intrusion. Only when the rape fits a culturally acceptable profile--perpetuated by a stranger, on a woman of "good moral character," preferably with a weapon and with bruises or cuts to prove that violence actually took place--is the crime likely to be prosecuted.[39] When women try to name as rape those attacks that don't fit that profile, the system works to shut them down. When aggressive and coercive sexual behavior by men is deemed the norm, the legal system is understandably hesitant to hold individual men accountable for a range of questionable behaviors that seem "normal."

A MASS-MEDIATED WORLD

Stepping back from those doctrinal questions, we must ask about the impact of a survivors' wall in a culture dominated by

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communication with Dan Hale, February 2, 1994. Hale represented the woman in the second case.

[37] A query about this problem to a women's studies computer discussion list produced reports on several cases. For details of such a case, see Todd Ackerman, "UH Dismisses Professor Accused of Harassment," Houston Chronicle, January 8, 1994, at A-25; and Ackerman, "UH Sex Harassment Case About to Become a Nightmare," Houston Chronicle, March 8, 1993, at A-6.

[38] **California case (citation to come).**

[39] See Vachss, "All Rape is 'Real' Rape," New York Times, August 11, 1993, A-11, and Sex Crimes; and Lees, "Judicial Rape."

mass media, and especially electronic media. Whatever the benefits to the small number of participants and readers, a survivors' wall can do little to counter the very different message about rape that pervades mainstream media. Television, movies, and news accounts of rape that endorse certain rape stereotypes, or at best do little to counter those myths, are prime shapers of public attitudes.[40] Notes on a survivors' wall have little power to counter such messages.

So, while liberal free-speech doctrine has evolved in the 20th century to protect the rights of the individual speaker in a public space--the speaker on a soapbox in a park--that doctrine has been less successful at coping with changes in technology and in media industries. As newspaper competition dwindles and corporations gain more control of more publications, liberal free-speech doctrine has been unable to find a way to guarantee citizen access.[41] In broadcast media, where the government has assumed some regulatory authority, significant citizen input or access is hardly any more meaningful.[42] As other contributors to this book have argued, the underlying issue is the dominance of corporate, commercial media in the United States and the way in which the First Amendment has been used to block public input into decisions about those media.[43]

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[40] For specific studies of these stereotypes, see Helen Benedict, Virgin or Vamp: How the Press Covers Sex Crimes (New York: Oxford University Press, 1992); and Susan L. Brinson, "TV Rape: Television's Communication of Cultural Attitudes towards Rape," Women's Studies in Communication, 12:2 (Fall 1989): 23-36.

[41] Miami Herald v. Tornillo, 418 U.S. 241 (1974), invalidating a right-of-reply statute.

[42] Much is made of the Reagan-era FCC's decision to scrap the Fairness Doctrine, which the Supreme Court had upheld in Red Lion v. FCC, 395 U.S. 367 (1969). In reality the FCC rules have never been a vehicle for serious citizen access to broadcast media.

When feminists argue that entertainment media's portrayals of women as sexualized objects is one factor that heightens the risk of sexual assault, media companies can simply explain that the First Amendment precludes the government from taking any action to hold them accountable.[44] Only when profits are threatened, are media corporations spurred to act.[45]

So, when for every one person who reads a survivors' wall and comes to a new understanding of the oppressive nature of sexual violence, there are 10,000 or 10 million (a specific number isn't crucial to the argument) viewers watching a film that depicts a woman enjoying being raped, it is important to ask whose speech is freer and what the First Amendment is protecting. In that context, the survivors' wall, while a useful channel for some people, is not a serious challenge to patriarchy.

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[43] Some First Amendment scholars have tried to address this issue while remaining true to liberal ideology. The results are tentative calls for some government intervention to mandate that in very limited circumstancs, citizens have access to mass media. See Jerome A. Barron, Freedom of the Press for Whom? The Right of Access to Mass Media. (Bloomington: Indiana University Press, 1973); and Thomas I. Emerson, "The Affirmative Side of the First Amendment." Georgia Law Review, 15 (Summer 1981): 795-849.

An example is cable television, where the solution often has been for local governments to mandate that private cable companies provide a public access channel. But in competition with up to a hundred or more channels showing professionally produced material, the amateur productions on a public access station rarely attract many viewers.

[44] There is a certain irony in this argument. Corporations use their private status to block public (government) intervention, also known as censorship. So, when private citizens, acting outside government through private associations, use various forms of pressure (letter-writing campaigns, picketing, threats of boycotts) to make their concerns known and press for action, the media corporations accuse them of trying to impose censorship.

[45] As we write this, media corporations are taking half-hearted steps to respond to public disgust with the heightened levels of gratuitous violence possibly as a way to head off potential government responses to the call of citizens by imposing regulations on broadcasters. This current debate has rarely touched on violence against women.

Before Speech Happens

Stepping back again, another question appears: What about the speech of women who have not yet found their voice? How does the First Amendment work for women who have been silenced by the patriarchal violence of cultural attitudes that deny the existence of their harm? Again, when power differentials rule in intimate settings, neutral rules and procedures regarding speech have the effect of favoring the powerful. In this context, the problem isn't even about equal access to major media outlets, since access is of no value without a voice. The concern at this level is for the woman who was raped or sexually abused by a trusted member of the family and could not find, or has not yet found, the words to put on the board; the woman who, no matter what vehicles are available to her, has been silenced, maybe permanently, by patriarchal violence and her own feelings of shame and fear. What of the women who, living in a state of oppression, are left without a voice? Liberal free-speech ideology has no theory, no doctrine, and no rules to reach people for whom powerlessness not only prevents them from being heard, but from having anything to say. Liberalism addresses the issue of silencing, but only when someone is poised to speak and is stopped from speaking by the government. The question of collective action to help people find their voice, however, is almost never a part of legal discourse, especially when the root cause of the silence is deeply embedded in the private sphere, where patriarchal violence so often takes place.

Feminism can be used to redefine the boundaries between traditional notions of free speech and the silencing rooted in the oppression of women. What has long been thought of as outside the purview of the law (e.g., the silent cry of rape or incest) can be defined as a central issue in Firt Amendment jurisprudence. Recognizing that some women may want to speak but cannot out of fear, or do not because of restraints imposed by existing doctrine (e.g., libel suits), would force society to redefine the meaning of freedom and the meaning of speech. It would require government to work toward a society in which the meaningful exercise of freedom is possible. Are there risks that, in pursuing such collective solutions, individual expression will be squelched? Yes, but perhaps the more important question is why legal liberalism is so unconcerned with those voices that go unheard under traditional First Amendment doctrine.

SKETCHING A FEMINIST THEORY OF FREE EXPRESSION

Because our goal is something more than an abstract notion of freedom protected by neutral rules and procedures, it is crucial to be clear about our first principles: resisting oppressive systems that maintain unequal distributions of power and resources, and finding ways to give voice to those who are silenced by such systems. Justice--the rectification of past injustice and elimination of present forms of subordination, "the human plea for decent lives"[46]--should be the goal of theory. The goal of feminism is an end to all oppressions, not just gender oppression, and one way toward that goal is theorizing free expression from a feminist point of view.

We begin with an often ignored question, which Frederick Schauer put as "why is speech special"?[47] That is, why do we consider it necessary to give speech more protection than other forms of behavior? Like Schauer, we conclude there is no compelling reason to do so. Schauer admits the "intellectual ache" in his acceptance of the speech-is-special position; we avoid the ache and argue that it is not. That allows us to question the assumption that all speech starts out as protected speech and that we should carve out exceptions only when massive evidence of harm exists. We start with the assumption that any speech that injures can be restricted through collective action. Under traditional libertarian First Amendment doctrine, protecting some dangerous, harmful, offensive or even oppressive speech is the price we pay for freedom. We ask questions about what counts as speech and who is identified as an affected party in the speech, so that we can be clear who is being asked to pay for what.

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[46] Matsuda, "Pragmatism Modified," at 1768.

[47] Frederick Schauer, "Must Speech Be Special?" Northwestern University Law Review, 78:5 (December 1983): 1284-1306.

Notions of the nature of the individual and the formation of the self are important in understanding freedom of expression. Robin West describes the liberal order as premised on a separation thesis, "[t]he claim that we are physically individuated from every other" and "that what separates us is epistemologically and morally prior to what connects us."[48] This feminist view of freedom of expression is based on the rejection of that thesis and the assertion that we better understand ourselves as "second persons," people constantly learning the art of personhood.[49] We live in relation, and any conception of the self as standing outside of relationships is unrealistic. Thus, the goal in both epistemology and morality is "an appropriate interplay between autonomy on the one hand, and communal solidarity on the other."[50] We always are partly who others construct us to be, and in contemporary society, various mass media channels have great power to do that.

In traditional freedom of expression law, the focus is primarily on the speaker and his/her right to speak, on rare occasions on consequences of that speech on listeners, and in even rarer cases on a third party who has been affected by the actions of the listeners (when direct causal links between the speaker's inciting speech and the listener's act can be shown).

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[48] Robin West, "Jurisprudence and Gender," University of Chicago Law Review, 55:1 (Winter 1988): 2.

[49] Lorraine Code, "Second Persons," in Marsha Hanen and Kai Nielsen, eds., Science, Morality and Feminist Theory (Calgary: University of Calgary Press, 19878), 357-382. A revised version of this paper appears as Chapter 3 in What Can She Know? Feminist Theory and the Construction of Knowledge (Ithaca, NY: Cornell University Press, 1991).

[50] Ibid., at 382.

In West's terms, this liberal position views speech as primarily expressive, with a focus on the individual. A more progressive view frames speech as primarily communicative, something that creates community and "a social soul."[51] Here, the value of speech depends on the quality of the relationships and communities the speech engenders.

Lisa Heldke similarly argues that speaking is better understood as a collective activity than the product of an individual and that the focus on the speaker limits our ability to understand the position of listeners, potential speakers, potential listeners, and other community members whose lives might be indirectly affected. We should view communication as something that is created among people and affects all in the chain. In Heldke's words, this view changes the question from:

> "Is this speaker free to say what he or she will?" to "Is the talk in this situation free--are all members of the group participating at a level that promotes, rather than prohibits, the speech of others?"[52]

If we are in crucial ways always in the process of being constructed by others at the same time as we work to construct ourselves, we must re-examine any rule or doctrine that is justified by an appeal to individual autonomy, especially in regard to issues involving the media and representation. Because the speech of some can perpetuate hierarchies and silence others, subordinated people have an especially important stake in gaining some control over how dominant forces in society construct them.

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[51] Robin West, "Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's 'Constitutional Identity,'" Cardozo Law Review, 14:3-4 (January 1993): 761.

[52] Lisa Heldke, "Do You Mind If I Speak Freely? Reconceptualiizing Freedom of Speech," Social Theory and Practice, 17:3 (Fall 1991): 359.

The difficult question, of course, is whether there can be "individuality without individualism"?[53] Is there a way to acknowledge and attend to those connections between people that are truly constitutive of personal identity without denying particularity? Liberalism's attention to, or obsession with, individualism has not been without its benefits in freeing people from the direct constraints of authoritarian powers; it is important to remember that two centuries ago people in England were tortured for speech critical of government, and that well into this century government officials at all levels in the United States did not hesitate to throw into jail socialists, radical, union organizers and others deemed to be stirring up trouble through speech. The point we press, however, is that liberalism also protects the individuality of some at the expense of others, whose subordinated status sometimes negates the possibilities of individual expression. The vague charge that collective action necessarily leads to totalitarianism--so central to liberal attacks on such things as hate-speech codes--not only is hyperbolic but obscures the suppression that is inherent in the workings of a liberal system in an unequal society, where power and oppression go unnamed.

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[53] This phrase is from Marilyn Friedman, "Individuality without Individualism: Review of Janice Raymond's A Passon for Friends," Hypatia, 3:2 (Summer 1988): 131-137.

If one accepts that speech is not special,[54] then the considerable energy devoted by scholars to identifying the line between speech and action is of questionable value. Both speech and action, used here with common definitions, have tangible effects in the world. The law punishes a number of types of pure speech--blackmail, threats, conspiracy, participation in criminal acts by speaking--without concern for First Amendment implications. In those cases, the harm involved is not considered debatable. From our view, the harm from a variety of other kinds of speech--sexist or racist insults, pornography, and the general category of hate speech--is equally clear and worthy of society's concern. Forms of expression/action that may seem harmless on the surface--such as mainstream images in journalism, advertising, and entertainment that sexualize, trivialize and marginalize women--are also of great concern. That does not mean that laws must be passed in each case to limit those expression/actions, but that each deserves scrutiny. Following West, we argue the First Amendment should focus on:

> the protection and facilitation of communication rather than expression, and the well-functioning community, rather than the soul-barring, expressive individual of conscience, as its inherent ideal.[55]

This theoretical perspective leads to a clear doctrinal commitment: Freedom of expression should not be limited to political speech--seen as speech specifically about politics--a tactic used by the right to try to construct a narrow First Amendment[56] and by the left/center to try to construct a more defensible First Amendment.[57] The idea that speech-about-government is at the heart of the First Amendment makes some intuitive sense in a democracy, if one accepts the public/private split. But if we understand politics to be the play of power in relationships, then the political or non-political (using conventional terms) nature of expression is less relevant to First Amendment law. The more important question is how expression reinforces or challenges oppressive power. Expression that helps maintain patriarchal systems may or may not be political, in that narrow sense of the word. If, as we have argued, a conception of freedom of expression must remain focused on power, then we must accept the political nature of decisions about such a system of free expression and acknowledge that such victories on those decisions will be difficult to secure. Rather than search for neutral principles, the goal should be a political process that gives oppressed people a voice in the shaping of such doctrines. Rather than focus only on state action, the goal should be freedom of expression in the public and private realms.

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[54] See Stanley Fish, There's No Such Thing as Free Speech, and It's a Good Thing, Too (New York: Oxford University Press, 1994).

[55] West, "Toward a First Amendment Jurisprudence of Respect," 765.

To sum up: We contend that freedom of expression is about more than just the absence of government restraints on a speaker (a negative freedom concerned only about public power). It also is about oppressed people being free from the communication of others that harms them, both directly and indirectly (a negative freedom, but expanded into the private sphere) and about people being free to communicate to others the reality of their lives (a positive freedom). This involves restraints on both public and private power to prevent harm and the positive use of public power to help people find a voice.

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[56] The most often-cited example is Robert H. Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal, 47:1 (Fall 1971): 1-35.

[57] The classic text here is Alexander Meiklejohn, Political Freedom (New York: Oxford University Press, 1965).

AN APPLICATION OF THE THEORY

How might a feminist view change the way we adjudicate free expression disputes? We borrow from Martha McCluskey's analysis of the Colby College fraternity case, in which school administrators banned fraternities and later punished members of underground fraternities.[58] The fraternity members unsuccessfully sued, highlighting First Amendment issues of speech and association and the interpretation of the state's hate speech law. From a feminist framework, McCluskey points out that, while the college won, it won for the wrong reasons.

One of the reasons for the college's action was the fraternities' role in promoting sexist behavior and sexual violence toward female students.[59] The Maine Civil Liberties Union took up the cause of the fraternities, arguing that the college violated fraternity members' First Amendment rights.

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[58] Martha T. McCluskey, "Privileged Violence."

[59] For evidence that fraternities tolerate, if not actually encfourage, sexual coercion of women, see Stacey Copenhaven and Elizabeth Frauerholz, "Sexual Victimization Among Sorority Women: Exploring the Link Between Sexual Violence and Institutional Practices," Sex Roles, 24: 1-2 (1991): 31-41.

Both trial and appellate courts upheld the punishment of fraternity members, basing their decision on the state action doctrine: Because Colby is a private school, First Amendment concerns were not applicable, and the court should not mediate such a dispute between two private parties.

McCluskey points out a number of lessons from the case: how violence by members of privileged groups (such as mostly white and all-male fraternities) goes not only unpunished but unseen, and how American society exaggerates male suffering that results from a loss of privilege and trivializes the physical violence against marginalized groups. She also hints at how fraternity members' speech and actions restricted the free speech of women and some non-fraternity men on campus.[60] But we would push the point further and highlight the way in which men's violence can be a direct cause of the silencing of some women.[61] If, as McCluskey states and we have no reason to dispute,[62] the fraternity in question had "a central purpose of fostering misogyny, and an actual practice of harassing and terrorizing women and other students,"[63] then the fraternity members' First Amendment defense can be answered by a more compelling First Amendment argument by women. Sexual violence silences women. The First Amendment is, most importantly, about promoting speech.

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[60] Ibid at 310.

[61] This also is a contention of the feminist anti-pornography movement. See Andrea Dworkin, "Against the Male Flood," in her Letters from a War Zone (London: Secker & Warburg, 1988) 253-275.

[62] For a study of patterns of such behavior, see Peggy Reeves Sanday, Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus (New York: New York University Press, 1990).

[63] McClusky, "Privileged Violence," at 296.

The activities of those fraternity members were suppressing women's speech, not to mention restricting their ability to move and live free of fear. Here the words of Andrea Dworkin, written specifically about pornography, are powerful and appropriate:

> If what we want to say is not hurt me, we have the real social power only to use silence as eloquent dissent. Silence is what women have instead of speech. Silence is our dissent during rape . . . Silence is our moving, persuasive dissent during battery . . . Silence is a fine dissent during incest and for all the long years after that. Silence is not speech. We have silence, not speech.[64]

How should a judge approach such a case, framed as competing First Amendment interests? Instead of retreating behind neutral principles and state action doctrine, we would argue that judges should ask certain basic questions about power, privilege, and their effects on the ability of all involved to speak. If the fraternity members' misogynistic terrorist activities worked to silence women in classrooms, in college dorms, and on campus, then it seems clear that a decision to eliminate fraternities would be not an assault on the constitutional guarantee of free speech, but should be seen as First Amendment friendly.

This case reminds us that for the First Amendment to be truly a vehicle for protecting freedom of expression, we must allow it to reach beyond the narrowly defined public arena and hold private power accountable. We must listen not only to privileged voices but to the stories and concerns of oppressed people, with the goal of taking seriously the injuries they suffer at the hands of power. We must also be willing to use the political process to give those people hurt a chance to protect themselves and fight back.

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[64] Dworkin, Letters from a War Zone, at 269-270.

We offer no detailed program for implementing these goals. But despite the liberal contention that the only choice is between authoritarian censorship and laissez-faire approaches to speech, viable solutions to these problems are possible. For example, we look to the anti-pornography civil rights ordinance as a model for feminist jurisprudence in action.[65] We have not focused on that critique of and attack on pornography, in part because it has been the subject of extensive debate and discussion for more than a decade, and also because it tends to polarize the debate. However, the ordinance--either overtly or implicitly--is consistent with most, if not all, of the principles we have outlined, and it would be disingenuous for us not to support it. The ordinance showed how putting a feminist twist on conventional tort law could provide women an avenue to both individual empowerment and societal change. The rejection of that approach to pornography in the courts suggests we are far from being able to apply the ordinance's reasoning to more mainstream media, but there are no theoretical reasons not to. The ordinance's strengths are in its refusal to accept liberal definitions of the issue, its attack on private forces that threaten women and children, and its strategy of placing the power to initiate legal actions against pornographers in the hands of the women who are hurt by it.

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[65] For the clearest articulation and defense of the ordinance, see Andrea Dworkin and Catharine A. MacKinnon, Pornography and Civil Rights: A New Day for Women's Equality (Minneapolis: Organizing Against Pornography, 1988).

Another proposal that incorporates elements of our argument is Cynthia Grant Bowman's suggestion of a state statute or municipal ordinance to provide both criminal and civil remedies for women harassed on the street by strangers.[66] Bowman argues that street harassment results in an informal ghettoization of women to the private sphere, due in large part to "the thinly concealed violence underlying each of these encounters."[67] In balancing the harms with First Amendment concerns, Bowman argues that harassing speech *(1)* is outside commonly accepted boundaries of the First Amendment, *(2)* falls within established exceptions, and *(3)* is low-value speech far afield from central concern of the First Amendment that should be subject to minimal scrutiny. Even if subjected to strict scrutiny, such a law passes muster, Bowman argues, because "it is essential to compelling state interests unrelated to the suppression of free expression: the security, liberty, and equality of women."[68]

Like the anti-pornography ordinance, Bowman's proposed law rejects male definitions of what happens when a woman is harassed on the street,[69] focuses on private forces that produce the injury, and, through the civil remedies, gives the women hurt by men the power to initiate legal actions.

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[66] Cynthia Grant Bowman, "Street Harassment and the Informal Ghettoization of Women," Harvard Law Review, 106:3 (January 1993): 517-580. Bowman describes street harassment as cases in which a male harasser targets a woman he doesn't know in a face-to-face encounter in a public space with speech that isn't intended as public discourse and is "objectively degrading, objectifying, humiliating, and frequently threatening in nature" (p. 524).

[67] Ibid .at 526.

[68] Ibid at 546.

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CONCLUSION:

To say that patriarchy silences oppressed people or women or survivors of rape and incest is not to say that no one from those groups ever finds their voices. A liberal system of free expression does result in such expression by some. But it also raises often insurmountable barriers that silence others. Often, those who break through remind us of how we do not know how many have been silenced forever. Elly Danica's account of her life as an incest victim and survivor is such a work. She concludes her book with these words and this question:

> Survival. Dreaming with a pen in my hand. Writing. Writing. Writing. Who will hear me?[70]

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[69] Elizabeth Arveda Kissling discusses how the unwanted "compliments" men say they give to women mark men's space, construct women as being for sex, and create "an environment of sexual terrorism" for women in general. ["Street Harassment: The Language of Sexual Terrorism," Discourse & Society, 2:4 (1991): 456].

[70] Elly Danica, Don't: A Woman's Word (San Francisco: Cleis Press, 1988) 104.

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Digital Imaging, The News Media and The Law:
A Look at Libel, Privacy, Copyright and Evidence
In a Digital Age

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This paper focuses on some of the legal questions raised by digital imaging with regard to news photographs. Four areas: libel, privacy, copyright and rules of evidence each provide examples of the dilemmas that photojournalists will face with this new technology. The scope of this discussion is limited to only a few of the concerns in each of the four areas; clearly, digital imaging raises a plethora of questions in each of these areas and the author does not pretend to address them all. This paper attempts to discuss the existing laws and predict how they will address this latest communications technology.

The courts currently recognize the limitations of conventional photographs, accepting their version of reality as long as the attorneys revealed any manipulations. Digital editing should not keep a photograph from accurately representing reality in a courtroom or on the front page. Failing a constitutional amendment, the media could solve many of the credibility problems by adopting standards for using the electronic editing and imaging processes.

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A Look at Libel, Privacy, Copyright and Evidence In a Digital Age

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Abstract

This paper focuses on some of the legal questions raised by digital imaging with regard to news photographs. Four areas: libel, privacy, copyright and rules of evidence each provide examples of the dilemmas that photojournalists will face with this new technology. The scope of this discussion is limited to only a few of the concerns in each of the four areas; clearly, digital imaging raises a plethora of questions in each of these areas and the author does not pretend to address them all. This paper attempts to discuss the existing laws and predict how they will address this latest communications technology.

Digital Imaging, The News Media and The Law
A Look at Libel, Privacy, Copyright and Evidence In a Digital Age

This paper focuses on some of the legal questions raised by digital imaging with regard to news photographs. Four areas: libel, privacy, copyright and rules of evidence each provide examples of the dilemmas that photojournalists will face with this new technology. The scope of this discussion is limited to only a few of the concerns in each of the four areas; clearly, digital imaging raises a plethora of questions in each of these areas and the author does not pretend to address them all. This paper attempts to discuss the existing laws and predict how they will address this latest communications technology.

Libel law does not differentiate between photographs and text, but rather accepts the notion that both could contain defamatory content. The research did not produce an example of bona fide photographic libel, but several libel cases involving defamation through photographs. The history of libel law provides two important areas of discussion, actual malice[1] and negligence, which could impact the legal future of digitally enhanced photographs. The discussion will attempt to keep the issue of libel separate from that of privacy although many of the plaintiffs in these cases sought damages for both torts.

The exploration of privacy proved interesting, due largely to the historical ambiguity in case law. The right to privacy is ellusive in any context, limited at the federal level and protected on a state-by-state basis. While few legal journals discussed digital imaging directly, many articles addressed privacy and electronically gathered information. Computers digitally store and transfer electronic images in the same manner as other personal information and this similarity led to the comparisons drawn in this paper.

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[1] The publication (or broadcast) of defamatory material with reckless disregard for the truth or knowledge of its falsity.

Copyright provided the most information, perhaps because federal and state statutes devote so much attention to this area. This discussion focuses solely on image ownership and the "intellectual property rights" of freelance photojournalists. Although present case law on digital information focuses on audio recordings, digital photographs are likely to face similar challenges.

The final area for this discussion deals with the relationship between photographs and the courtroom. Historically, the legal system admitted photographs as pictorial testimony or "silent witnesses" because of their perceived ability to capture reality. With digital imaging, the courts may change the admissibility standard and create more stringent authentication criteria for photographic evidence.

This paper limits the legal debates surrounding digital imaging to news photographs with one exception: the rules of evidence for admitting photographs into the courtroom do not distinguish between the amateur or professional status of a photographer. In that area, the debate will include all photographs and focus on the credibility of photographs as a medium.

Libel

Case law historically defined libel as defamation of a person's character through a medium to a potentially large audience. In the petition plaintiff had only to identify the defendant, to claim that the offensive words were broadcast or published and to claim that the words were defamatory. From that point on, the courts assumed that the language in question was false and defamatory. The defendant carried the entire burden of proof in the courtroom, with truth and accuracy as the only acceptable defenses. Case law clearly favored the plaintiff until 1964 when the U.S. Supreme Court handed down its landmark decision in *New York Times v. Sullivan.* "The case was revolutionary because, for the first time, the Supreme Court entered an arena that had previously been reserved to the states - civil libel law." (Hopkins, pg. 2)

With its decision in *New York Times v. Sullivan*, the Supreme Court extended First Amendment protection to inaccurate comment about public figures. "A defense for erroneous statements honestly made is no less essential here ..." (Gunther, pg. 1079, quoting Brennan) Unlike the state courts, the Supreme Court sought to balance the individual right of reputation with the societal need for public debate.

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (ibid.)

Justice Brennan's opinion did make a distinction between honest mistakes that deserved constitutional protection and a "reckless disregard" for the truth. The press could not expect protection when it acted with actual malice. "Under this (legal) standard, neither the communications media nor individuals could be held responsible in civil libel suits for nonmalicious falsehoods about the official conduct of public servants." (Lawhorne, pg. 34) The decision also introduced the "public official"[2] standard into libel law.

With its decision in *New York Times v. Sullivan*, the Court lowered the amount of protection that a plaintiff, particularly a public official, could expect from libel laws.

Not long after, the Court extended the public official definition to include public figures in *Associated Press v. Walker* (1967). The majority opinion held that public figures had to prove actual malice to win a libel case. In *Monitor Patroit Co. v. Roy* (1971), the court further extended actual malice to candidates for public office.

> The Court held that candidates for public office must be treated the same as public officials and that a publication charging criminal conduct, no matter how remote in time or place, against a candidate would have full protection of the *New York Times* rule. (Pritchett, pg. 105)

It took some time for the Court to develop standards for private figures in libel cases. Finally, in *Gertz v. Robert Welch, Inc.* (1974) the Court held that a bona fide private figure had only to prove that the publisher was negligent in order to win a libel suit. The Court's definition of negligence represents a much lower burden of proof for the defendant than actual malice; for example, in *Time Inc. v. Firestone* (1976), the Court held that a reporter's misreading a court decision was negligent.

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[2] The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood related to his official conduct unless he proves that the statement was made with actual malice ... (Gunther, pg. 1080)

These contemporary standards for actual malice and negligence provide the legal basis to discuss defamation through photographs.[3] However, the state courts recognized the potential for defamation through photographs as early as 1906, when the Wisconsin Supreme Court wrote: "'It is elementary that a libel need not be in printed language, but that a ... picture' can bring 'disgrace, contempt, or ridicule.' upon a person." (Sherer, pg. 619)

In the following cases, no court distiguished between libel through text or image. The courts reviewed the entire publication as the context for the alleged defamation. "The 'truth' of news photography is not automatic, however, but may depend on the overall impression given by the entire publication." (Sherer, pg. 622) Therefore, these are not examples of photographic libel per se but libel cases involving photographs.

The Utah Supreme Court examined the issues of public figures and defamatory photographic content in *Cox v. Hatch* (1988). The plaintiffs: Shelia Ann Cox, Susan Keller and Susan Smith, alleged that U.S. Senator Orrin Hatch defamed them and invaded their privacy by using their photograph in a political flyer. The plantiffs argued that the inclusion of their photograph implied their endorsement of Senator Hatch's reelection campaign.

> They deny having endorsed him; indeed, they point out that because they are postal employees they are precluded by federal law from publicly approving or endorsing any political candidate or actively participating in a political campaign. They assert that after the publication of the photograph, they were investigated by

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[3] The research produced no Supreme Court decisions regarding phtographs and libel.

> their employer and the union as to the extent of their involvement in Hatch's campaign. (16 Med. L. Rptr. 1367)

The court accepted the plaintiffs claim that "the photograph implicitly asserts that they are Republicans and supporters of Senator Hatch, and we assume ... that assertion is ... defamatory." (ibid., pg. 1369)

Senator Hatch contended that the flyer represented political speech and was therefore entitled to absolute First Amendment protection. In its decision, the court addressed the need to balance the First Amendment with other legal rights.

> Freedom of speech is not only the hallmark of a free people, but is, indeed, an essential attribute of the sovereignty of citizenship. Free speech does not, however, always prevail against all other values, such as those protected by the state law of defamation, invasion of privacy and abuse of personal identity. (ibid., pg. 1368)

The court distinguished between public employees and public officials, deciding that the plaintiffs' positions as postal workers did not invite public scrutiny. However, the court ruled that the plaintiffs did not satisfy Utah's legal standards for defamation:

> a communciation must impeach an individual's honesty, integrity, virtue, or reputation or publish his or her natural defects or expose him or her to public hatred, contempt, or ridicule. (ibid., pg 1370)

A case decided in the U.S. Court of Appeals, Eighth Circuit, also centered on questions of emotional distress and actual malice. In *Peoples Bank & Trust Co. v. Globe International* (1992), the plaintiff, Nellie Mitchell, sued after The Sun used her picture with an article: "World's oldest newspaper carrier, 101, quits because she's pregnant." (19 Med. L. Rptr. 2098) Mitchell, 96 at the time, had operated a newspaper stand in Mountain Home, Arkansas, since 1963. The Sun, a tabloid newspaper known for its outrageous coverage, ran Mitchell's photograph with an article about "Audrey Wiles," a ficticious Australian newspaper carrier. In its appeal, the Globe did not dispute that the article was false; in fact Globe relied on The Star's status as "pure fiction" as a defense. Further, Globe admitted that the article would offend a reasonable person and was in fact highly offensive to Mitchell.

> The central issue on appeal is the existence of actual malice: whether Globe intended, or recklessly failed to anticipate, that readers would construe the story as conveying actual facts or events concerning Mitchell. Globe contends that, as a matter of law, no reader reasonably could construe the story as conveying actual facts about Mitchell, and that no evidence supports a finding that Globe intended that result. (20 Med. L. Rptr, pg. 1927)

In Arkansas state court, Peoples won $650,000 in compensatory and $850,000 in punitive damages for invasion of privacy and outrage (libel) on Mitchell's behalf. The jury found for the media defendant on the issue of defamation. Globe appealed to the U.S. District Court, Western District of Arkansas, requesting a review of the ficticious nature of the article. Globe also alleged that Mitchell failed to show evidence of emotional distress.

The District Court found that Globe's assertion of fictitious coverage was questionable, as some articles in The Sun contained some truth. "...some of its 'authors' testified that some of the articles were factual or at least based on fact, and it became obvious that even they could not tell the difference." (19 Med. L. Rptr., pg. 2100)

The court also said that Globe equated "'extreme emotional distress' with the existence of objective evidence that an individual suffered emotional distress." (ibid.) The court held that "a reasonable juror might conclude that Nellie Mitchell's experience could be likened to that of a person who had been dragged slowly through a pile of untreated sewage." (ibid., pg. 2101)

The District Court also sought to balance the First Amendment rights described in *New York Times* with the individual right to control his or her good reputation.

> Defendant undoubtedly has the Constitutional right to publish "newspaper stories," "literature," "fiction," or whatever the articles described above and others in this issue are, but when it does and damages others by doing so, our system literally demands that the injured person be adequately compensated in an attempt to make them whole, or as whole as money can make them. (ibid, pg. 2101-2102)

The District Court denied the defendant's motion to overturn the jury verdict. Globe then appealed the decision to the U.S. Court of Appeals, Eighth Circuit.

The Court of Appeals agreed with the lower courts on the issue of The Sun as a work of fiction.

> Our analysis of the *Sun* 'newspaper' leads us to conclude that Globe does not intend the *Sun* to be an obvious work of fiction at all, but rather holds out the publication as factual and true. The format and sytle of the *Sun* suggest it is a factual newspaper. (20 Med. L. Rptr., pg. 1928)

Therefore, The Sun fell under the limitations described in *New York Times* and failed to meet the constitutional standard for erroneous statements honestly made. "It is the kind of *calculated* falsehood against which the First Amendment can tolerate sanctions without significant impairment of its function." (ibid., ppg. 1929)

In addition, The Sun editor who chose Mitchell's photograph testified that he knew that she was a real person and but had assumed that she was dead. No one at The Sun made any attempt to verify

Mitchell's death. The court considered this oversight as sufficient evidence to support the jury's award for damages of false light invasion of privacy[4] but not to support the plantiff's claim of outrage (libel). The Court of Appeals ruled that the compensatory damages were inflated and remanded that the fine be substantially reduced, but affirmed the liability and punitive damages.

The accuracy of a photograph and newsgathering techniques provided the basis for a libel suit in *Bazzi v. News Group Publications Inc.* (1989). The case involved The New York Post's publication of three photographs that depicted Muna Bazzi in an apparent suicide attempt, her rescue and her transport to Bellevue Hospital. The Post article said: "The woman, identified as Muna Bazzi, is Lebanese and was said to be upset over the death of her relatives in the fighting for Beirut." (16 Med. L. Rptr 2269) The New York Supreme Court specifically discussed The Post's newsgathering techniques in its decision without considering the truth or falsity of the pictures or article.

> The determinative issue in this case is whether or not the defendants acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. (ibid.)

The Post used photographs and captions from The Associated Press, photos from a Post photographer at the scene, and information from a police radio report and a phone call to the police precinct. The court said that only one reliable source was necesary and the Post had two - The

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[4] The publication placed Mitchell in a false light, thereby invading her privacy. This concept will be explored further in the privacy section of this paper.

Associated Press and its own photographer.[5] "Thus the plaintiff cannot prove that defendants acted in a grossly irresponsible manner pursuant to the standards imposed on publications in this state." (ibid.)

None of these cases questioned a photograph's ability to defame a person's reputation. In *Cox*, the Utah Supreme Court clearly equated the publication of a defamatory statement with a photograph, thereby holding text and pictures to the same libel standard. The courts simply applied the *New York Times* rule to each case, basing their decisions on questions of malice and negligence. The legal standards examine the defendants conduct during newsgathering (*Bazzi, Peoples*), the photograph's role in defamation (*Kelson*) and the use of the photographs in publication (*Cox, Peoples*). The evidence seems to indicate that the court will hold the computer operator, whether editor, photographer or another, to the same standard. To avoid possible legal action, newspapers should ensure that computer operators use digital imaging in a responsible manner with the intent of preserving truth and accuracy. It follows that the computer operator will have to meet the same standards of responsible newsgathering set forth in existing libel laws.

Invasion of Privacy

The debate now turns to the issue of privacy, again beginning with a brief look at its legal history. Like libel law, the individual states historically created their own definition of privacy law. Noted legal scholars Samuel Warren and Louis Brandeis provided the theoretical framework for the individual's 'right to be let alone' in an article that set the stage for a Supreme Court decision in 1965.

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[5] Michael Sherer notes that several media defendants received favorable court decisions by employing "proper reporting procedures in gathering and publishing news photography." (pg. 621)

> The upshot was the Brandeis and Warren went back to the wellhead of modern democratic thought, John Locke, and found in his political philosophy an argument for the right to privacy as a logical extension of Locke's arguments about the inalienable right to property. (Knowlton and Parsons, pg. 83)

In *Griswold vs. Connecticut* the Court allowed a constitutional right to privacy, and, according to Justice Black's dissenting opinion, stretched the framers' intentions beyond reason. Justice Douglas, in the court's opinion, wrote:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives ... seeks to achieve its goals by means having a maximum destructive impact upon that relationship. We deal with a right of privacy older than the [Bill of Rights]. (Gunther, pg. 495)

Justice Goldberg, in a concurring opinion, argued for the fundamental right to privacy despite its omission from the Constitution. Goldberg, joined by Chief Justice Warren and Justice Brennan, derived the right to privacy from the Ninth, Fifth and Fourteenth Amendments. He argued that the Ninth Amendment reflected the framers belief that additional individual rights existed alongside those specifically mentioned in the first eight amendments.

> My conclusion [that liberty] embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions [and] by the language and history of the Ninth Amendment, [which] reveal that the Framers [believed] that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first [eight] amendments. (Gunther, quoting Goldberg's opinion, pg. 495)

Before *Griswold*, state courts developed a set of common law torts to protect individual privacy from four types of invasion that are still recognized today: "(1) the intrusion upon one's seclusion; (2) the public disclosure of private facts; (3) publicity that places one in a false light; and (4) the misappropriation of one's name or likeness for commercial purposes." (Reidenberg, pg. 221) The last two types of invasion potentially present the greatest legal threat to digital photographs.

The false light publicity torts protect the individual from inaccurate publicity. Even more than conventional darkroom techniques, digital editing allows for image manipulation to the point distorting the manifest visual contect. Unlike manual darkroom techniques, digital editing is quick and impossible to detect.

> While there have always been ways of manipulating B&W photographs, with scissors, airbrushing, and multiple prints, these manipulations have never been built into the production systems of newspapers. Before the advent of digital photo editing, a skilled printer had to make deliberate choices for manipulation, and it took time. Now anyone in any department of a newspaper could decide on changes in photographic images by simply having access to the computer system. (Reaves, pg. 47)

Even more than digital imaging, electronic photography lends itself to this type of manipulation because of the lack of permanent record. The issue of "false light publicity," once avoided through the routine ethical photojournalism practices, may now be of greater concern. Computer operators, often more concerned with aesthetically pleasing images than accurate ones, now make decisions to crop and edit photos quickly and virtually without detection.

Television advertisements revived the furor over misappropriation through the use of digital imaging. Through the magic of pixels, Elton

John performed along side Louis Armstrong, Humphrey Bogart and James Cagney in a Diet Coke commercial. (Tomlinson and Harris, pg. 26) And as an encore, Diet Coke arranged for Paula Abdul to dance with Gene Kelley and Groucho Marx and share a soda with Cary Grant.

> All of this digital manipulation also has tremendous impacts on legal rights, such as privacy and publicity. In the Diet Coke commercial, needless to say, neither Bogart nor Cagney nor Armstrong (nor Kelley, nor Marx, nor Grant) gave his permission to Coca-Cola to be included in a television commercial hawking Diet Coke. (Tomlinson and Harris, pg. 26)

Misappropriation in print advertisements abounds as well. A recent advertisement in Rolling Stone magazine used an aged Jim Morrison to promote jeans for the Gap; photographs of former President George Bush and President Bill Clinton each appeared in political advertisements for the other side during the 1992 presidential campaign. This photographic manipulation recalls the debate over a derivative work[6]; an editor chooses to take the original image out of context, alter the visual contents and release the product again to serve his own ends.

While copyright laws currently fail to address a digital image, the electronically stored photograph may be subject to current privacy laws. "Under the Electronic Communications Privacy Act of 1986, ... (t)he contents of stored messages, such as electronic mail, may ... be disclosed only with the consent of one of the parties." (Reidenberg, pg. 215)

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[6] A derivative work ... requires a process of recasting, transforming or adapting one or more pre-existing works. Derivation is concerned with the physical changing or alteration of the structure of a pre-existing work or works. (Tomlinson and Harris, pg. 30)

Electronic photography takes pictures by digitally storing the information and transmitting it through a carrier to a computer drive; then the computer operator stores the image on hard disk or floppy either before or after editing. The published newspaper could easily represent the first tangible photograph. The photo remains a stored message, computer bytes, until someone prints a physical product.

> "The EPCA provides separate criminal penalties for the unauthorized access to transaction records and stored electronic communications, much as electronic mail, by anyone other than the service provider, subscriber or communications addressee." (Reidenberg, pg. 216)

The privacy laws certainly outpace the copyright laws and seem to offer the private individual more protection from a digital image that invades his or her privacy than copyright law provides for freelance photojournalists.

Copyright

This nation's founders combined John Locke's ideas the individual right to own the fruits of his or her labor with the notion of a free market economy, which provides the foundation for modern copyright law. These concepts allowed a person to own products created by his own labor and sell those products at a fair market value. This section briefly discusses the history of American copyright law before turning to the issues of image protection and image ownership.

Copyright laws began to appear in the colonies as early as 1783. State laws often extended Locke's argument about an individual's right to own the products of his or her labor to include intellectual protery. Although Locke never specifically extended his argument to intellectual property, copyright protection covered literary activities as products of a man's mind. Many of the state copyright laws were simply a continuation of England's Licensing Act and Copyright Acts.

> The underlying assumption here is that human beings require economic reward to be intellectually or artistically creative. The philosophy of intellectual property reifies economic rationalism as a natural human trait. (Bettig, pg. 146)

The Constitution provides protection for Science and the Arts by granting authors and inventors the right to profit from their work for a limited time before it passes into public domain. The first congressional copyright law in 1790 granted protection for literary works, maps and charts. It wasn't until 1802 that statutes granted designs, engravings and etchings copyright protection. In 1865, Congress specifically extended copyright laws to include photographs and their negatives; this amendment went untested until 1884 in *Burrow-Giles Lithographic Co. v. Sarony*. The printing company challenged the copyright protection of photographs since the Constitution provided protection for writings and authors, but not photographers or photographs. The court rejected the defendant's argument and expanded the definition of writings to include literary products, which certainly encompassed photographs. The court also dealt with the issue of constitutional protection for modern technology.

> "The only reason why photographs were not included in ... the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted." (Court opinion according to Tomlinson and Harris, pg. 14-15)

This line of reasoning indicates copyright protection for digital imaging, which produces the familiar photographic image but bypasses many of the production steps associated with conventional photography.

On the other hand, the struggle over the use of computer information may move digital photographs into a new legal arena.

> With technological developments having revolutionized the basic properties of the photographic image (i.e., computerized master imagery and storage on such non-traditional base forms as the floppy disk), an original digital photographic image may not be logically copyrightable under one seemingly reasonable interpretation of present law. (Tomlinson and Harris, pg. 16)

This requires a legal definition for a fixed, permanent or stable image in a tangible medium. "The question is whether a computer file reasonably could be called 'permanent' or 'stable' since it easily can be fundamentally, undetectably, and irrevocably manipulated." (Tomlinson and Harris, pg. 17) The temporary nature of computer storage, as opposed to the traditional photographic negative, may reduce copyright protection for a digital image.

Image ownership is often difficult to prove simply because many photographers often cover the same event. A newsroom staff photographer, based primarily on his or her professional relationship with the editors, is more likely to control his or her photographs than a freelance photojournalist. The freelancer often sends his or her work in from remote locations without entering the newsroom. Freelance photojournalists may have the most to lose in the area of copyright.

> The freelance, non-staff photojournalist is particularly concerned by computer-assisted digital manipulation since, for example, newspapers and magazines could sometime obtain (or retain) a free-lancer's photograph, digitally manipulate it and publish it without notifying or compensating the free-lancer (or the photo agency with markets the licensing of the photograph for the copyright owner/original photographer). (Tomlinson and Harris, pg. 3)

Separate from the image protection is the issue of image ownership. The 1909 Copyright Act considered the employer as the author in a work for hire relationship. This removed the creator from owning or profiting from the work once he/she completed the job and accepted payment. The subsequent court decisions did little to amend the work for hire relationship until 1976. The court, in an attempt to clarify the relationship, defined work for hire as work within the context of employment or specially ordered or commissioned work.

> However, the problem was that this scheme did not resolve the issue of when the free-lancer would be the copyright owner and when the 'commissioner' would be the copyright owner because the phrase 'a work prepared by an employee within the scope of his or her employment' was not defined beyond the mere stating of the words themselves, leaving courts in no better position in this regard than they had been in relation to the 1909 Act. (Tomlinson and Harris, pg. 20)

Over the next 13 years, the lower courts struggled with the question of work for hire with mixed results. Finally in 1989 the Supreme Court used *Community for Creative Non-Violence v. Reid* to create a set of tests to determine a freelancer's status.

> The Court listed the various tests that should be employed in determining a free-lancer's status as either employee or independent contractor in relation to the commissioner of the work, such as: the hiring party's right to control the project; the skills required of the free-lancer; the source of the tools used to create the work; the location where the work was done; the duration of the working relationship between the parties; the hiring party's right to assign additional projects; and the method of payment. (Tomlinson and Harris, pg. 22)

Using the Court's criteria, freelance photojournalists are independent contractors rather than employees, which allows them more ownership and control over their work. Given these criteria, the photojournalist usually possesses skills that the contractor (in this case, editor) does not. Photojournalists tend to own their own equipment and choose their work locations. A relationship between a freelancer and the newsroom might be long-standing but it is not continual. The freelancer retains the right to accept or decline an assignment and typically earns a wage per assignment as opposed to a periodic salary.

While Congress and the Supreme Court granted copyright protection of the image and the image maker, digital imaging allows for copyright infringements in ways that were previously unimaginable. Editors were always able to create photo compilations, mixing images into montages and photo mosaics, but digital editing will make cut and paste collections seem like child's play. Now the photograph can be fragmented and reused so that even the original photographer may not recognize his/her work through digital visual sampling. An editor now has the tools to create a derivative image based on the original work. This further complicated image ownership, because a compilation includes the creative property from the photographer, the editor and, to some extent, the computer operator. It is evident that, without the original image, the derivation would not have been possible and therein lies the legal basis for the photojournalists' copyright infringement case.

Rules of Evidence

The final area of study is the relationship between the courts and the photograph. The legal community reinforced society's respect of photos as mirror on reality by allowing them into court as evidence.

> In evidenciary terms, the next best thing to the object or the scene itself is a reproduction or representation of the object or scene made by a highly accurate machine. Photographs, x-rays, videotapes, movies and sound recordings fall into this category. (Siemer, pg. 63)

The courts apply two theories of authentication, the pictorial testimony and the silent witness, before admitting photographs into evidence. "Under the pictorial testimony theory, one who has personal knowledge of that which is depicted in the photograph testifies to the photograph's accuracy." (Guilshan, pg. 368) This witness could be the photographer or another person with firsthand knowledge of the scene who testifies to the accuracy of the photograph. (Siemer, pg. 63) In the absence of that kind of witness, it is also possible for an expert verify the technical competence of the machine (camera or computer) that created the photograph. In the second theory, "the photographic evidence is a 'silent witness' which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness." (Guilshan, pg. 369)

Guilshan challenged the continued acceptance of photographs as accurate reflections on reality for courtroom evidence based on her perception of the widespread use of digital imaging.

> "The problem with all types of electronic photography is the ease with which data can be scanned or entered into the computer and manipulated. Once altered, the original can be erased and the new image in effect becomes the 'original.' It is impossible to tell whether an electronic image comes directly from a camera or has been enhanced or altered by a computer. (Guilshan, pg. 374)

However, a historical look at photography reveals that manipulation has always been possible. The darkroom processes always allowed the darkroom editor to control photographic content through cropping, dodging, burning and airbrushing. In ethical photojournalism, these processes improve the aesthetic quality of a photo without detracting from its accuracy.

> "Photographic manipulation is not new. It's just that is has never before been so flawless and fast. Digital retouching makes alterations undetectable-shadows can be corrected, sizes can be matched to scale, colors and objects can be cloned to match perfectly." (Martin, pg. 51)

Defenders of digital imaging assert that absolute photographic integrity was never attainable. Some newspaper editors maintain that, as long as the manifest content of the photograph remains the same, electronic imaging is the dodging, burning and cropping function of the 1990s.

The courts acknowledged photography's inability to act as a window on reality and, despite the possibility for manipulation, admitted photos as evidence. In a sense, photographs were as likely (or unlikely) as their human counterparts to bear testimony to the truth. The legal system revised the standards of admissibility to reflect the new technology but still routinely allows for digital images under rules for computer generated evidence.

> "The basic theory is that, with knowledge of both the photographic process and the phenomena that cause the degradation of the image (e.g., blurring or graininess), a digital computer can be programmed to reverse that degradation and enhance the photographic image. Authentication, and cross-examination, therefore must focus on the sources of knowledge and the models of degradation." (Joseph, pg. 8-22)

The courts distinguish between computer generated evidence that "reiterates computer stored human declarations and that which does not." (Joseph, pg. 7-3) The second category covers computer enhanced photographic images, computer generated simulations and reconstructions. A significant distinction for computer generated evidence is in the definition of hearsay evidence.

> A computer printout or other output of the sort that reflects computer stored human statements is hearsay when introduced for

> the truth of the matter asserted in the statements. In contrast, computer generated evidence which is generated solely by the electrical and mechanical operations of the computer, and which do not reiterate the extrajudicial statements of a declarant, is not hearsay. It is demonstrative evidence of a scientific test or experiment to be judged on that distinct basis. (Joseph, pg. 7-4, 7-5)

This raises an interesting question: at what point does a digital image become a photograph? A computer enhanced photograph is still a photograph: it starts with a conventional camera and negatives before undergoing a modern editing method.[7]

The court definition of computer generated evidence presents an interesting, but not insurmountable challenge for photographic evidence. The difference is in production, a digital image versus a conventional camera, but the end result is the same, a photograph. Courts require juries to listen to all the testimony and decide the truth for themselves. Lawyers could easily call photographers, editors and computer operators to testify about the production process of a given photograph.

This paper focused on four areas: libel, privacy, copyright and photographs as legal evidence. The discussion placed digital editing in the context of the existing laws and attempted to draw some conclusions for the legal future of each area.

Libel law[8] deals with photographs and statements (written or spoken) with the *New York Times* rule and subsequent judicial standards for defamation. The photojournalists and editors who argue for a greater truth through enhanced or manipulated photos should heed this legal tradition. A court could easily translate the standards of actual malice to photo editing techniques. Although some journalists argue that different portions of the paper maintain different standards of truth -- where the front page is no place for a manipulated or enhanced photo but the sports page is -- the court found ruled differently in *Peoples*. In fact, the availablity of some truth in The Star was reason enough to hold the entire publication to the standard of accuracy in that case. If there is a reasonable expectation of truth and accuracy, then the publication should clearly indicate those circumstances where the photograph no longer bears any resemblence to reality.

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[7] Electronic photography, a technology that replaces film with a computer chip, and image synthesis, a process that creates photographs mathematically, both raise similar questions.

[8] Tomlinson notes: "The First Amendment will not bar digitexing practices." (Computer Manipuations and Creation of Images and Sounds: Assessing the Impact, pg. 55)

Privacy laws may seek to protect invasions of privacy before publication occurs, not through prior restraint but in the area of database protection. Digital imaging stores photographs electronically, allowing for easy retrieval and reuse. The increased access into databases may entice those who would use digital imaging to invade privacy. Currently, Citibank Visa gives its customers the option to display their photographs on their credit cards. If Citibank stores those photographs electronically, it is possible to retrieve them and use the images in any number of ways.

Digital imaging may present the largest threat to false light publicity and intrusion. The technology not only allows for traditional editing; the computer operator can manipulate the depth of field and the focal point. It is a simple matter to edit a crowd shot at a football game and create an image of just one or two people. Granted, the enhancements may not be perfect. The computer operator can correct any distorted features: hair style, skin pigmentation, nose. This obviously exceeds the bounds of reasonable editing, perhaps even going beyond image manipulation. The technology virtually gives the computer operator the ability to digitally create images.

As for the discussion of copyright, it was always difficult for a freelance photojournalist to control the use of his/her images. Digital imaging and electronic photography may further advantage those who would fraudulently use and abuse these images. Tomlinson and Harris offer a proposal that acknowledges that the technology is here to stay and attempts to protect photojournalists against the possibility of potential losses in revenue.

> In analyzing the problems free-lance photojournalists are beginning to face as photojournalism becomes digital, the focus could be placed on the potential plaintiff; perhaps, though, the best solution would come from focusing on the potential defendants, the entities which would be doing the infringing. (Tomlinson and Harris, pg. 54-55)

This suggestion assumes that some form of infringement will take place simply because the technology makes it so easy and tempting. It provides the photojournalists some peace of mind and economic compensation by increasing the fees paid by the news agency to the stock photo agency and the photojournalist. The potential defendants: newspapers, magazines, television networks and publishers, would pay two fees; the first to the photojournalist or his/her agent, the second to a general fund. The freelancers would split the fund among themselves, using the number of first-hand and archival photos to determine royalty distribution.

> The scheme proposed here would be a way for free-lance photojournalists to know they were receiving some compensation for the repeated and/or derivative use of their work; it would satisfy the psychological need to sue that likely otherwise would be felt;

> and it would remove the frustration from the existing non-system. (Tomlinson and Harris, pg. 60)

The solution proposed by Tomlinson and Harris dodges the issue of infringement but provides protection for the freelance photojournalist through contractual and systematic economic compensation. However this proposal violates the "innocent until proven guilty" premise on which our legal system rests; it uses the mere existence of the technology to prove guilt and penalize an entire industry.

There are other suggestions, most involving image protection through encoded digital information. The Clinton Administration announced plans to protect electronic communications by encoding the information. The user would then need Clipper Chips, a set of computer algorithms, to access the information. (Markoff, pg. A1) Another proposal would bury a digital signature within the electronic information in order to prevent excessive manipulation.

These encoding systems would offer some protection against unauthorized first use, but they do little to dissuade the fraudulent reuse use of a photograph. Once an editor decoded a photograph, what would stop him/her from using it again? And the digital signature would have to predict the type or extent of manipulation before it could effectively prevent it.

Photographs as courtroom evidence may be the simplest legal problem to address. As previously discussed, legal scholars easily proposed revisions for theories of photographic evidence that allow for digital images. The courts currently recognize the limitations of conventional photographs, accepting their version of reality as long as the attorneys revealed any manipulations. Digital editing should not keep a photograph from accurately representing reality in a courtroom or on the front page.

One legal scholar, Robert Garcia, calls for a constitutional amendment to deal the issue of computer information. Although he focused his research on electronic information gathered by the government, his conclusion could easily encompass electronic images as well. The following quotation could easily substitute the word "media" for government and "audience" for governed.

> Applying existing constitutional protections without regard to the technology is not enough where information technology threatens to alter the relationship between the government and the governed. Computers allow the government to do things that have not been done before. We should accept that simple truth in evaluating the promise and the threat of computers to police the people. (Garcia, pg. 1144)

Failing a constitutional amendment, the media could solve many of the credibility problems by adopting standards for using the electronic editing and imaging processes.

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Lani Guinier
&
The Press

Paper is a content analysis of the print coverage in six national publications of the nomination and withdrawal of Lani Guinier for the assistant attorney general, Justice Department, Civil Rights Division. Assertion analysis used in study found press bias against Guinier nomination 65% to 35%. Statistical significance is shown in preponderance of pro-quota and anti-democratic arguments advanced in coverage. Agenda-setting effects are pervasively indicated in the direction of the coverage. Concludes rhetoric and context of press coverage was framed and virtually directed by opponents of Guinier's nomination.

Lani Guinier & The Press

> The future of the American Democracy is contingent upon the performance of the American press. If newsmen of today and tomorrow are diligent workers and balanced thinkers on problems of governing our society, then I have no doubt that the American Democracy will survive and flourish as a symbol to the whole world. If the press fails in its responsibility—if it founders in a quagmire of superficiality, partisanship, laziness and incompetence—then our great experiment in democracy will fail.[1]
>
> —*Clark Mollenhoff*

On April 29, 1993, a University of Pennsylvania law professor and former litigator for the NAACP Legal Defense Fund, Lani Guinier, was announced as President Bill Clinton's choice for assistant attorney general to head the Justice Department's Civil Rights Division. The next day *The Wall Street Journal* reported Guinier's nomination, along with five other assistant attorney general nominees, in a news item by Joe Davidson.[2] An op-ed article on pg. A12, "Clinton's Quota Queens," hitting Guinier, and another Clinton nominee, Norma Cantu, appeared in the *Journal*'s editorial pages. Its author was Clint Bolick, an acknowledged conservative and former Reagan administration Justice official.[3] Bolick liberally used quotations plucked from Guinier's law review articles to paint a picture of Guinier as an extreme activist with an "in-your-face civil rights agenda" whose favorite societal remedies were race- or minority-based quota schemes. In addition to being in favor of quotas, Bolick accused Guinier of being radical, anti-democratic, and promoting racial divisiveness. It was the "first shot" fired in a series of volleys destined to dethrone Prof. Guinier's nomination.

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[1] Quoted by John C. Merrill, "Three Theories of Press Responsibility and the Advantages of Pluralistic Individualism," in **Responsible Journalism,** Deni Elliot, ed., (Beverly Hills, CA: Sage Publications, Inc.: 1986) pg. 47-8.

[2] Joe Davidson, "Clinton names six to be assistant attorneys general," *The Wall Street Journal*, April 30, 1993, pg. B7.

[3] Michael Isikoff, "Power Behind the Thrown Nominee: Activist With Score to Settle," *The Washington Post*, June 6, 1993, pg. A11.

"We argued that anyone who read Guinier's writings would find them unacceptable,"[4] Bolick said in a release circulated by his Institute for Justice. For the next month the mass media was the scene of "The Battle for Guinier: Quota Queen or Mis-Quoted Queen?" *The New York Times* editorialized against Guinier saying: "she dismisses 'majoritarian' voting as inherently discriminatory." Seeming moderates and liberals defected by the boatload to the anti-Guinier camp. Defections within Democratic ranks eventually led to Clinton's capitulation on June 3, when he withdrew Guinier's nomination.[5] One administration official said, "The idea that Democrats on the Senate Judiciary Committee were going to publicly express doubts about the administration's nominee for a third-level Justice Department position based on academic writings was unprecedented."[6] Clinton had bowed out, citing a bloody and divisive battle that would have to be fought over ideas he found "very difficult to defend," if Guinier's confirmation could be won.

During and after the "debate" over Guinier's nomination the press came under criticism for its coverage.[7] Guinier and her supporters accused reporters of superficially examining her ideas and writings and parroting the conservative line about them.[8] Guinier's critics insisted that the press had seriously examined her writings, "not snippets, [but] the full texts,"[9] and found her notions of democracy and equality wanting.[10] How did the press cover Guinier's nomination? Specifically, how did national publications fare in reporting Guinier's ideas and nomination? Did they fail or succeed in presenting a "accurate and balanced" view of an important news event?

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[4] Linda P. Campbell and Michael Tackett, "Race Issue, not Radicalism Scuttled Guinier Selection," *Chicago Tribune*, June 6, 1993, Sec. 4, pg. 4.

[5] Eleanor Clift, "A Hard Right Turn," *Newsweek*, June 14, 1993, pgs. 24-26 and "Sinking Guinier," *The Nation*, June 21, 1993, pg. 855-6.

[6] Ruth Marcus and Ann Devroy, "Another Lesson in Confirmation Pitfalls," *Washington Post*, June 5, 1993, pg. A12.

[7] See "Derelict on Lani Guinier," by Joann Byrd, *The Washington Post National Weekly Edition*, May 1, 1994, pg. 28; "Anatomy of a Smear," by Anthony Lewis, *New York Times*, June 4, 1993, pg. A31; "Getting Guinier," *The Nation*, May 31, 1993, pgs. 724-5; and "The Smearing of Lani Guinier," by Clarence Page, *Chicago Tribune*, May 30, 1993, Sec. 4, pg. 3.

[8] See "Lani Guinier tells media they failed," by Mark Fitzgerald, *Editor and Publisher*, July 31, 1993, pgs. 9-10; "In Defense of Lani Guinier," by T. Alexander Aleinikoff and Richard H. Pildes, *The Wall Street Journal*, May 13, 1993, pg. A15; "Sinking Guinier," *The Nation*, June 21, 1993, pgs. 855-6; and "Lani, We Hardly Knew Ye," by Patricia J. Williams, *The Village Voice*, June 15, 1993.

[9] John Leo, "A Second Look at Lani Guinier," *U.S. News & World Report*, March 14, 1994, pg. 19.

One critic of the press's coverage, Laurel Leff, formerly the national legal editor for American Lawyer Media newspapers, had criticized the role that *Washington Post* reporter Michael Isikoff, *Newsweek's* Bob Cohn, and others had earlier played in painting the picture of Guinier's views and the controversy surrounding them.[11] Since the controversy was initiated by Bolick and other opponents' interpretations of Guinier's writings, Leff wrote that journalists should first get an accurate and fair reading of Guinier's writings, and include that as part of their reporting. Leff argued that most reporting on the Guinier nomination had failed to do so. Isikoff had defended himself by saying, *"This is not a case where newspaper reporters set the agenda.* What I was doing was reporting a controversy. My job was to explain to our readers what the controversy was about."[12] (Emphasis added) Explaining Guinier's complex views in a balanced manner was not his job, he said.[13]

Whose job was it to explain Guinier's views to the public? Who, then, one might ask, did set the "Guinier agenda," and what was that agenda? *Who*, one can ask media pundits, should have set the agenda? What might this imply about the media's performance as decipherers of matters of public interest and debate? If Bolick and like-minded conservatives' goal was to derail Guinier's nomination, might not "impartial" journalists consider that framing her views in an "unacceptable" light as possibly paramount in the Guinier controversy? Does it serve the public interest for the press to assume a complicitous posture in allowing, Leff concluded, a "nominee's opponent . . . [to] set the agenda and dominate the debate?"[14]

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[10] See "Hillary's Choice On Civil Rights: Back to the Future," by Paul A. Gigot, *The Wall Street Journal*, May 7, 1993, pg. A14; "The Legal Philosophy That Produced Lani Guinier," by Clint Bolick, *The Wall Street Journal*, June 2, 1993, pg. A15; "Principle or Politics," by Joe Klein, *Newsweek*, June 14, 1993, pg. 29; "Redesigning Democracy," by Alan Wolfe, *The New York Times Book Review*, March 13, 1994, pg. 6; "A New Spin on Democracy," by Abigail Thernstrom, *The Wall Street Journal*, March 24, 1994, pg. A16; and "Minority Rules," by Steven Markman, *National Review*, March 21, 1994, pgs. 66-8.

[11] Laurel Leff, "From Legal Scholar to Quota Queen," *Columbia Journalism Review*, September/October 1993, pgs. 37-8, 40. Leff discusses Isikoff's May 21 *Post* article, "Confirmation Battle Looms Over Guinier" and Bob Cohn's May 24 Newsweek article, "Crowning a 'Quota Queen?" Leff said Isikoff "had himself been part of that drumbeat, quoting conservatives' assessments of Guinier as a pro-quota, ' "extreme" left-wing activist.' " Cohn criticized Guinier for the minority veto among other things which he said gives "black lawmakers the power to obstruct bills they do not like." Leff said, "What was left out [of Cohn's commentary] was fifty-three pages in which Guinier cogently criticized the current remedy for voting rights violations and nineteen pages [from her 77-page *Michigan Law Review* article "The Triumph of Tokenism"] in which she tentatively offered several alternatives, only one of which was a 'minority veto.' " Thus Cohn effectively threw his weight (and *Newsweek*'s) in with Guinier critics.

[12] Leff, *op. cit.*, pg. 38.

[13] *ibid.*

LITERATURE REVIEW

Democratic media theorists, of both the libertarian and social responsibility "schools," propose that the press is essential to rational, responsible, and informed democratic governance by the public.[15] The press is a kind of catalyst by which citizens exercise control over government. The key is the news media's role in providing the 'open and complete account of the day's intelligence' necessary for such governance. James Madison said, "a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; for perhaps both."[16] Because of this function of the news media in American democracy, the question of who or what sets the media's agenda becomes crucially germane. The media is not limited, however, to the providing "popular information" for "popular government." The media "informs" decisionmaking at government levels as well. "If the media have some power to influence both public and policy agendas," asks David Swanson, "how—and how responsibly—is this power exercised?"[17]

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[14] *ibid.*, pg. 41.

[15] F.S. Siebert, T.B. Peterson, and W. Schramm, ***Four Theories of the Press,*** (Urbana, IL: University of Illinois Press, 1956).

[16] Quoted in Gary R. Orren's preface to ***Impact: How the Press Affects Federal Policymaking*** (New York, NY: W.W. Norton & Company, 1986) by Martin Linsky, pg. 7.

[17] David L. Swanson, "Feeling the Elephant: Some Observations on Agenda-Setting Research" in ***Communication Yearbook 11,*** J. A. Anderson, ed., (Newbury Park, CA: Sage Publications, 1988) pg. 603.

When *Post* reporter Isikoff refers to 'setting the agenda,' he is saying that in the case of Lani Guinier the news media did not frame the issues and conflicts that set off the controversy. The notions under contention, that Prof. Guinier was (or was not) favorable to quotas, anti-democratic, and radical were charges that Guinier's opposition, not the media brought to the table. The term "agenda setting" as employed in mass communication studies did not usually refer to the processes of issue framing, but rather issue prominence or *salience*. The agenda-setting hypothesis proposed that the mass media have a prioritizing effect upon the issues which the audience (or individual) thinks about. The agenda-setting power of the news media derives from the causal inference media researchers have made between a temporal sequence of events. Initially media reporting occurs, which in turn affects the "perceptions of issue importance" (salience).[18] Becker, McCombs, and McLeod specify that the agenda-setting function of the mass media postulates a "strong, positive relationship between the emphases of mass media coverage and the salience of these topics in the minds of . . . the audience."[19] One supposition that arises from this conception of agenda setting is that increased salience will affect the priorities of policy makers and, hence, policy.[20] When the mass media focus on a topic, this "increased emphasis" greatly enhances the topic's salience for the audience. Becker et al., echo Walter Lippmann, suggesting: "Here may lie one of the most important effects of modern mass communication—the ability of the media to structure our world for us."[21]

As researchers began to consider more closely this capability of the media, the framing of issues, as a kind of "micro-process," did become relevant to agenda-setting concerns. Every topic or issue contains within itself various attributes—by which it is identified—and these attributes, in turn, comprise a set which constitutes another agenda. The attributes of an object—i.e., an idea, issue, event—are part and parcel of the process through which all communication occurs. "Among the attributes of a topic," said McCombs, "or any object in the news — are the *perspectives* that journalists and the public use in thinking about that topic."[22] (Emphasis added) Agenda setting, then, is a hypothesis *"about the transfer of salience, both the salience of objects* [topics or issues] *and the salience of their attributes."*[23] The framing of issues or events through which attributes unavoidably arise is subject to a more conscious determination or strategy. It has been found that the attributes of an object which are emphasized, or made salient, corresponded very closely with the attributes considered significant by the audience.[24] Thus McCombs, in reviewing the last 25 years of agenda-setting research, concluded that current research evidence has turned Bernard Cohen's seminal statement of the agenda-setting hypothesis—that 'the media may not tell us what to think, but are stunning successful in telling us what to think about'—"inside out."[25] "How a communicator frames an issue," McCombs said, "sets an agenda of attributes and can influence how we think about it. Agenda setting is a process that can affect both what to think about and how to think about it."[26]

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[18] Fay L. Cook, Tom R. Tyler, Edward G. Goetz, Margaret T. Gordon, David Protess, Donna R. Leff and Harvey L. Molotch, "Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers, and Policy," *Public Opinion Quarterly*, 47:17.

[19] Lee B. Becker, Maxwell E. McCombs, and Jack M. McLeod, "The Development of Political Cognitions," ***Political Communication,*** S. Chaffee, ed., (Beverly Hills, CA: Sage Publications, 1975) pg. 38.

[20] Cook, *op. cit.*

[21] Becker, *op. cit.*

Another concern of agenda-setting hypotheses is the need for orientation. The need for orientation is the "cognitive utilitarian motivation growing out of each person's 'need to be familiar with his surrounding,' to 'strive to "map" his world, to fill in enough detail to orient himself.' "[27] The need for orientation, not surprisingly, has been found to be related to the degree of knowledge or familiarity the person has with a particular issue. Certain studies have found that media agenda-setting influence varies by the degree of acquaintance, or obtrusiveness, the audience possesses for particular issues.[28] Unobtrusive issues are ones individuals or audiences have little or no experience with in their daily lives, for which the press may be the only source of information. Agenda-setting effects were more pronounced on those issues that were least obtrusive in impact.[29] Similar studies have found that high relevance of topic combined with high uncertainty about it (as with unobtrusive issues) results in a more pronounced need for orientation. The greater an individual's need for orientation on a political issue, the more she or he will use the mass media to acquire political information on the issue. Correspondingly, the greater the need for orientation, the higher the match between the reader's agendas and the agendas of the mass media.[30] Guinier's views and scholarship certainly could be classified (then) as unobtrusive (and political) relative to the media audience, but not "quotas," "democracy," and "radicalism," which have been and are (political) issues of high relevance to the public and policy agendas. Certainly, the media was the prime source of information on what Prof. Lani Guinier wrote and believed, and how her appointment might affect the country's civil rights agenda.

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[22] Maxwell E. McCombs, "Explorers and Surveyors: Expanding Strategies for Agenda-Setting Research," *Journalism Quarterly*, 69 (4): 820.
[23] Maxwell E. McCombs, "The Evolution of Agenda-Setting Research: Twenty-Five Years in the Marketplace of Ideas," *Journal of Communication* 43 (2): 62.
[24] McCombs, *op. cit.*, *Journalism Quarterly*, pg. 820 and McCombs, *op. cit.*, *Journal of Communication*, pg. 63.
[25] McCombs, *op. cit.*, *Journal of Communication*, pg. 63.
[26] *ibid.*, pg. 63.
[27] Swanson, *op. cit.*, pg. 606.

Linsky found that the agenda-setting power of the press, as affects the policy agenda or policymaking process, is not subject to strict rules or formulae.[31] It is rather the outcome of the interplay of various elements, harmonious and inharmonious, including, but not circumscribed to, the intentions of journalists and officials.

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[28] David H. Weaver, "Media Agenda-Setting and Media Manipulation," in ***Mass Communication Review Yearbook Vol. 3,*** D. Charles Whitney and Ellen Wartella, eds., (Beverly Hills, CA: Sage Publications, 1982) pgs. 540-3.

[29] Swanson, *op. cit.*, pg. 607.

[30] David H. Weaver, Maxwell E. McCombs, and Charles Spellman, "Watergate and the Media," *American Politics Quarterly*, October 1975, 3 (4): 462, 465-6.

[31] Martin Linsky, ***Impact: How the Press Affects Federal Policymaking*** (New York, NY: W.W. Norton & Company, 1986) pg. 89.

"Journalists can set the agenda without trying, just by doing their jobs."[32] Policymakers saw the press as playing a primary part in the policy-making process. Linsky found that more than 96% of the senior federal policymakers[33] in his survey said that the media had a definite impact on federal policy, more than half thought that the impact was substantial, and ten percent thought it was dominant.[34] Consequently, policymakers viewed the media as significantly affecting the policy agenda and influencing "how an issue is understood by policymakers, interest groups, and the public."[35] More than 70 percent thought that negative coverage decreased chances for accomplishing policy goals. More than 75 percent believed that positive media coverage increased those chances.[36] "Sometimes," Linsky said, "press considerations are so much a part of policy-making as to be indistinguishable from it."[37] In three[38] of the six in-depth Linsky case studies, there was an apparent significant impact *on the core of policy content itself;* there was a significant impact *on the process of policymaking evidenced in each case study.*[39]

Media coverage tended to two definite and observable impacts: 1) speeding up the decision-making process and 2) coverage, especially averse coverage, pushed decision making up the bureaucratic hierarchy to higher official levels. According to Linsky, " . . . some of the most significant impacts of the press occur early on the policymaking process, when it is not yet clear which issues will be addressed and what questions will be decided."[40] His three-year study of the interaction of the press and governmental policymakers concluded that trying to turn the agenda of press in one direction when the press is looking in another is "not easy."[41] Most officials found themselves personally involved in management of their press relations as an integral part of their jobs: seeking coverage of themselves and their programs, developing relationships with the media, and relationships developed because of symbiotic needs.[42] Most officials who responded to Linsky's survey thought they were unable to initiate stories on their own. Almost two-thirds of them said that more than half of the stories written about them or their agencies were initiated by the press.[43]

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[32] *ibid.*

[33] The policymakers in Linsky's study were, elected and appointed, such as Henry Kissinger, Melvin Laird, Elliot Richardson, Dean Rusk, James Schlesinger, Peter Person, Walt Rostow, Cyrus Vance, Stuart Eizenstat, Gerald Ford, Joseph Califano, and Zbigniew Brzezinski.

[34] Linsky, *op. cit.*, pg. 69, 84.

[35] *ibid.*, pg. 87.

[36] *ibid.*, pg. 114.

[37] *ibid.*, pg. 70.

[38] The 1969 Post Office reorganization, the neutron bomb production and deployment, and the Bob Jones tax exemption.

[39] Linsky, *op. cit.*, pg. 117.

[40] Martin Linsky, "Practicing Responsible Journalism: Press Impacts," in ***Responsible Journalism,*** Deni Elliot, ed., (Beverly Hills, CA: Sage Publications, Inc.: 1986) pg. 145.

Ettema et al.,[44] in their study of the media-policy-agenda connection pursued the issue raised by Swanson in his article "Feeling the elephant: Some observations on agenda-setting research," regarding the conceptual limitations inherent in the majority of agenda-setting studies. "Few studies," they said, "attempt to specify either the micro-processes that could explain the effect [of agenda setting] or the macro-contexts that would give it social significance."[45] They concluded, however, that the rules of contemporary media culture are dictated by a Baudrillardian "game of truth effects" in which the "effects serve the interests of real power."[46] "It is a game in which the public more often consumes the political spectacle than participates in self-government . . . " The media-policy connection is " 'policy game' played by policy elites in the press before a 'bystander public.' "[47] Their case study, which examines the impact of a "60 Minutes" segment, about international child abduction, on congressional and State Department policymaking "can be told with little . . . mention of the public or public opinion. . . . The connection between press-public-policy is not, then, linear or fixed;

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[41] *ibid.*, pg. 90.

[42] ibid., pgs. 85-6, 14-20.

[43] *ibid.*, pg. 92.

[44] James S. Ettema, David L. Protess, Donna R. Leff, Peter V. Miller, Jack Doppelt, and Fay L. Cook, "Agenda-Setting As Politics: A Case Study of the Press-Public-Policy Connection," *Communication*, 12:75-98 (1991).

[45] *ibid.*, pg. 75.

[46] *ibid.*, pg. 96.

[47] *ibid.*, pg. 93.

different connections are possible under different circumstances."[48] The possibility for "powerfully predictive" heuristic models of agenda setting connecting the three agendas is considerably reduced. Nonetheless they concluded that the manipulation of media images in the creation of "truth effects" was real evidence of mass-mediated power—within limits—with the capacity to influence political outcomes, i.e., alter the agendas of federal bureaucracies.[49]

A study by Cook et al., found that news media coverage does influence the perceptions of the public and governmental policy makers but not relevant interest group decision makers.[50] Government policy elites who had been exposed to news reports were more likely to advocate action based on these reports than those who were not exposed. Policy elites' evaluation of media reports as accurate directly related to the degree of influence that the media had upon them. Further, media coverage tended to affect the policy elites' perception of the public's agenda.[51] There was considerable difference, however, in how the media affected public and policy agendas. The problematic for the role of the press as described in traditional democratic theories is that what influenced the eventual policy recommendations was not the "aroused" members of the public but rather the "active collaboration" between journalists and government officials. "The role, which teams journalist and public official as Fact Finder, Presenter of 'Reality,' and Creator of Policy Result, may been seen by some as inimical to the democratic process."[52]

Intermedia agenda setting, then termed news diffusion, was first purposed as the "arterial process" whereby standardization of news content occurred through the influence of media opinion leaders—typically larger or more prestigious newspapers—

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[48] *ibid.*, pgs. 87, 79.
[49] *ibid.*, pg. 96.
[50] Cook, *op. cit.*, pg. 25.
[51] *ibid.*, pgs. 26-7.
[52] *ibid.* pg. 32-3.

on other newspapers.[53] "The danger," to democracy, Breed said, was "the potential influence of a small number of persons in deciding what millions of citizens will read."[54] Danielian and Reese's study of media coverage of the cocaine issue in 1986 found that media gatekeepers and influential media, such as *The New York Times,* significantly influenced the coverage and content given cocaine-related news in other newspapers and media.[55] Danielian and Reese examined the effects of intermedia "convergence" as well as agenda setting. Convergence is the process through which "the media discover issues, respond to each other in a cycle of peaking coverage, before largely dismissing the issues."[56] Methodologically, convergence is also more applicable when studying a single issue or story rather than a number of issues or stories which would constitute an agenda of issues and to the degree that "the media converge, not only on similar topics, but also similar themes, interpretations, and sources."[57] They found that convergence on the cocaine problem was more key to driving the media's coverage of the "drug epidemic of 1986" than any real epidemic itself. "The similarities of newsworkers' stories reassures them that they know the 'real news.' Following the lead of another organization serves the same function. Consistency is accuracy."[58]

Shoemaker and Reese identify ideological and extramedia influences upon media content.[59] They found that the more closely media are connected to ideological elites, the more media content will be congruent with those elites' viewpoints.[60] The more connections exist between extramedia interests and media organizations, the more influence extramedia interests will have. The more political or economic power a source has, the more likely she or he will influence media reports.[61]

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[53] Warren Breed, "Newspaper 'Opinion Leaders' and Processes of Standardization," *Journalism Quarterly,* 35:277-284, 328.

[54] *ibid.*, pg. 328.

[55] Lucig H. Danielian and Stephen D. Reese, "A Closer Look at Intermedia Influences on Agenda Setting: The Cocaine Issue of 1986, in " ***Communication Campaigns About Drugs: Government, Media and the Public,*** Pamela J. Shoemaker, ed., (Hillsdale, NJ: Lawrence Erlbaum Associates, 1989) pgs. 47-66.

[56] Stephen D. Reese and Lucig H. Danielian, "Intermedia Influence and the Drug Issue: Converging on Cocaine," in ***Communication Campaigns About Drugs: Government, Media and the Public,*** Pamela J. Shoemaker, ed., (Hillsdale, NJ: Lawrence Erlbaum Associates, 1989) pg. 30.

[57] *ibid.*

[58] *ibid.*, pg. 34.

[59] Pamela J. Shoemaker and Stephen D. Reese, ***Mediating the Message: Theories of Influence on Mass Media Content*** (White Plains, NY: Longman Publishing Group, 1991).

[60] *ibid.*, pg. 226.

According to Swanson, ". . . the process by which media agendas are formed seems to be best revealed not through . . . comparisons of 'real-world' objective indicators of the significance of events and the prominence given those events in news agendas but rather through direct investigation of the professional conventions and interpretive practices that lead to judging events as newsworthy and determining the kind and prominence of coverage they should be given."[62] One of these contemporary journalistic practices is the use of the information subsidy.[63] Such information subsidies can provided to news organizations by interest groups, such as Merton's "interest aggregations" and Blumer's "acting crowds," which are organized around or naturally converged toward a single agenda item.[64] These interest groups are significant forces that act to change the media's agenda, because "[t]he media cannot ignore 'what's happening,' even when it's being made to happen. . . . [An] active interest aggregation . . . creates a fascinating rhetoric that has the effect of controlling the very vocabulary of the discourse."[65]

A survey by Riffe et al., found that blacks in office generally had an unfavorable view of their own relationships with the white mainstream press.[66] Eighty percent of black elected officials viewed the press as more interested in controversy than routine coverage. Fewer than one-third said that they received fair treatment from opinion columnists. Three-fourths of the black elected officials concurred that white public figures had more influence with the press than they did. Two-thirds thought that media coverage of white and black officials was different and unequal.[67] Entman concluded that news programs may contribute to the cultivation of "modern racism"—resistance and rejection of black aspirations and goals—by portraying blacks as more demanding and partisan in political activities than their white counterparts.[68]

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[61] *ibid.* pg. 224.
[62] Swanson, *op. cit.*, pg. 616.
[63] Ettema, *op. cit.*, pg. 83.
[64] Bruce Westley, "What Makes It Change?" *Journal of Communication*, 26 (2): 43-47.
[65] *ibid.* pg. 46.
[66] Daniel Riffe, Don Sneed, and Roger Van Ommeren, "Black Elected Officeholders Find White Press Coverage Insensitive, Incomplete, and Inappropriate," *Howard Journal of Communications* 2 (4): 397-406.

METHOD

The study sought to answer the two afore-raised questions: one) How did national publications fare in their coverage of Prof. Guinier's ideas and the attendant "controversy?"; two) Who set the "Guinier agenda" for the press and what was it?; and a third), Is there a relationship between how the "Guinier agenda" was set and national publications' coverage of the Guinier nomination? The study was a content analysis of the coverage given Lani Guinier in four newspapers and three magazines of national scope, *The New York Times, The Wall Street Journal, U.S.A. Today, The Washington Post, Time, Newsweek,* and *U.S. News & World Report.* These publications collectively constitute something of a national (print) press. These publications are not "ordinary" but significant, in terms of their influence and prestige. All articles examined were from the period of April 30, 1993 to June 3, 1993,[69] the time period encompassing the announcement of Guinier's nomination through President Clinton's withdrawal of the nomination. The articles examined were editorials, news stories, op-ed pieces, biographies, guest columns, and department features that focused exclusively, or in large part, upon Guinier. Minor mentions of Guinier such as occurred in a *New York Times* complete text of a presidential press conference were excluded.

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[67] *ibid.* pg. 403.

[68] Robert Entman, "Blacks in the News: Television, Modern Racism and Cultural Change," *Journalism Quarterly*, 69 (2): 341-361.

[69] Including June 7 articles in *U.S. News & World Report* and *Newsweek*, which were written in context of a "live" nomination.

The articles were analyzed for oppositional reasons against and supportive reasons for Guinier's candidacy. The unit of analysis used was the assertion. Einsiedel and Bibbee used assertion analysis in their study of the McCarthy's 1976 presidential campaign.[70] Drawing from Budd, Thorpe and Donohew's ***Content Analysis of Communications,*** an assertion is defined as "a single thought unit or idea that conveys a single item of information extracted from a segment of content."[71] An assertion may be a whole sentence or any part of a sentence. Consider the following sentence from *Newsweek* (June 7, 1993 "Periscope," pg. 4): "She's been called a 'quota queen' and an extremist, but controversial Assistant Attorney General-nominee Lani Guinier isn't giving up without a fight." Assertion analysis extracts five assertions from this compound sentence: 1) She's been called a "quota queen" 2) She's been called an extremist 3) Lani Guinier is the Assistant Attorney General-nominee 4) Lani Guinier is controversial 5) Lani Guinier isn't giving up without a fight.

Assertions were only coded as supporting or opposing as they related to Guinier's candidacy. Neutral assertions were not coded. Statements which were strictly reportorial as opposed to interpretative were also dropped from the analysis. Consider the five assertions above. The first two contained in the compound fragment "She's been called a 'quota queen' and an extremist" are classified as reportorial; i.e., the writer is citing what someone else has said. The third assertion "Lani Guinier is the Assistant Attorney General-nominee" is dropped for either of two reasons, a) the writer has stated a reportorial "fact" (such as Lani Guinier is a woman or has brown hair), and b) contains no manifest content supporting or opposing Guinier's candidacy. The fifth assertion is likewise dropped. The fourth assertion that "She is controversial" can be coded because writer is making an interpretative statement (differing from a reportorial statement which in effect might state that *'there is a controversy'*) and is coded as opposing the nomination because the word controversial implies that Lani Guinier as an acceptable candidate for assistant attorney general is a debatable, contestable or questionable proposition.[72]

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[70] See E.F. Einsiedel and M. Jane Bibee's, "The News Magazines and Minority Candidates: Campaign '76," *Journalism Quarterly*, 56:103.
[71] *ibid.*

Supporting or opposing assertions were then classified into thirteen different categories. Supportive assertions were grouped into "AGAINST QUOTAS," "RADICALIZED BY CRITICS," "QUALIFIED CANDIDATE," "PRO-DEMOCRATIC," "VIEWS DISTORTED BY CRITICS," and "OTHER" categories. Opposing assertions were grouped into "(PRO) QUOTAS," "RADICAL," "RACIALIST," "PRO-BLACK," "ANTI-DEMOCRATIC," "UNTENABLE CANDIDACY," and "OTHER" categories. These categories were derived after reviewing assertions drawn from a random sample of articles that fell within and outside the period of the study. The variety of opposing reasons to Guinier's candidacy and supporting reasons for Guinier's candidacy are listed by categories below:

Oppositional

"QUOTAS": Pro-quota; quota queen; believes in equal outcomes, not equal opportunity; pro-affirmative action; for basic entitlements; promotes minority privilege; pro-busing.

"RADICAL": Is radical; radical writings; is ideologue; leftist beliefs; ideas outside mainstream; 'left-wing Bork'; reinterpreting Voting Rights Act; proponent of race critical theory; seeks extreme solutions beyond bounds of established law.

"RACIALIST": Believes whites are permanent hostile majority; will promote racial polarization; racially divisive beliefs; thinks Gov. Douglas Wilder and some black elected officials are Uncle Toms or 'inauthentic' black leaders; anti-integration; believes in racially divided society; proposes race-based remedies; promotes resegregation.

"PRO-BLACK": Believes blacks (only) should have more power; advocates supermajority pluralities for the advantage of blacks; advocates creation of 'safe' majority districts; promotes blacks' interest and power over whites; advocates black minority veto.

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[72] See definition of "controversial" on page 453 in ***The World Book Dictionary, Volume one, A-K*** (Chicago, IL: Doubleday & Company, 1983.)

"ANTI-DEMOCRATIC": Against majority rule; believes democracy is flawed; against one-man, one-vote principle; against established democratic electoral processes and procedures; for minority veto power over majority; believes minorities should have more power; advocates cumulative voting, proportionate influence; promotes minorities' interests and power over the majority.

"UNTENABLE CANDIDACY": Controversial; will not be approved by Senate; nomination in trouble; will be 'Borked.'

"OTHER"

Supportive
"NOT (PRO) QUOTAS": Not pro-quota, busing, guaranteed outcomes, or entitlements.

"RADICALIZED BY OPPONENTS": Conservatives against; under attack by conservatives; writings 'ponderous' but not radical; ideas in mainstream; does not reinterpret Voting Rights Act; writings are of an academic, speculative nature.

"QUALIFIED CANDIDATE": Excellent, experienced litigator; legal scholar; voting rights expert; thoughtful/complex thinker; creative, innovative; top-notch lawyer.

"NOT ANTI-DEMOCRATIC": Will seek to balance majority and minority rights; for minority rights, not privilege; seeks unique, fair ways to implement democratic practices.

"VIEWS DISTORTED BY CRITICS": Misquoted queen; against routine creation of black or 'safe' (single-member) majority districts; does not think Gov. Douglas Wilder or some black elected officials are Uncle Toms or 'inauthentic' black leaders; believes in interracial dialogue, cooperation and understanding; ideas misrepresented, misunderstood; views caricatured.

"OTHER"

Sources quoted and paraphrased in media stories were coded as supportive, oppositional, and neutral. The number of times a source was used in an article was tracked. The tracking method was to count uninterrupted quotation or paraphrasing of a source as a single instance within a paragraph. If a following paragraph was the continuation of the same statement or argument by the same source as in a directly preceding paragraph this is still counted as a single instance for the source. A source would be counted more than once within the same paragraph if the source was advancing different assertions or arguments interrupted by other sources or the writer herself. The following is an example of how this tracking method codes the number of instances of source assertions. Take the following paragraphs from "Confirmation Battle Looms Over Guinier" by Michael Isikoff (*The Washington Post*, May 21, 1993):

> Dayna Cunningham, assistant counsel at the NAACP Legal Defense and Educational Fund and a longtime colleague, said "the whole thrust" of Guinier's writings was to develop "new and creative ways" to enhance minority voting rights.
>
> According to Cunningham and other friends, Guinier is far from radical. . . .
>
> Washington lawyer Abbe Lowell, who worked closely with Guinier when she was a special assistant in the Justice Department's Civil Rights Division during the Carter administration, said those who minutely dissect the scholarly writings miss a larger point about her approach to the jobs she has held.
>
> He recalled "many a late-night meeting" in the Civil Rights Division to debate whether the Justice Department should intervene in police brutality cases.
>
> "She was thoughtful, balanced and intelligent, and she understood both sides of the issues," he said.[73]

There are two named sources used, Dayna Cunningham and Abbe Lowell. Cunningham made three assertions about Guinier. Lowell made five assertions about Guinier. Cunningham's quotes in the first paragraph constituted an uninterrupted instance of the same thought. In the following paragraph Cunningham asserts "Guinier is far from radical," which differs from assertions about the "thrust" of Guinier's writings. This is counted as two instances of the same source. The next three paragraphs quoted and paraphrased Abbe Lowell. The line of thinking presented here is congruent, although interrupted by two paragraph breaks. The point Lowell made is that those who dissect Guinier's scholarly writings miss the more important thing that he sees, her approach to the job, which is "thoughtful, balanced, . . ." The middle paragraph provides an evidential context to frame his opinion. All three paragraphs were counted as instance of one source.

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[73] pg. A23.

Headlines were also coded as supportive, opposing, or neutral as defined by categories above.

Intercoder reliability for a total of 71 items was 90.6% among three coders for five articles.

Level of significance was set at $p<.05$.

RESULTS

During the 35-day period of April 30, 1993 to June 3, 1993, the seven publications studied carried 27 articles devoted to the Lani Guinier nomination. The articles ranged from a long one-paragraph item ("Periscope" *Newsweek,* June 7) containing 113 words to full-page stories, complete with illustrations or photographs. Of the 27, 11 were news stories, three were editorials, four were op-eds, one was a guest column, and eight were 'others'—department articles, features, and a biography. Every one of the seven publications had at least two articles except *Time*, which carried *no* articles on Guinier during the period for which data was coded. *The New York Times* published nine (33.3%) of the stories run. *U.S.A. Today* published three (11.1%), *The Wall Street Journal* carried six (22.2%), *The Washington Post* carried five (18.5%), *Newsweek* published two (7.4%), and *U.S. News & World Report* published two (7.4%). It should be noted that each publication had additional coverage after Clinton withdrew Guinier's nomination, including *Time*. Of the 27 headlines run with these articles, three (11.1%) were supportive, nine (33.3%) were oppositional, and 15 (55.6%) were neutral. *Newsweek*, *U.S.A. Today*, and *The Wall Street Journal* each ran a supportive headline. Of the oppositional headlines, *The New York Times*, *U.S.A. Today*, and *U.S. News & World Report* each ran one, *The Wall Street Journal* ran four, and *The Washington Post* ran two.

Assertion analysis of the 27 stories revealed that 65.5% (315) of the 481 supporting and opposing assertions made about Guinier's nomination were opposing (See Table 1 in Appendix). The coverage in every publication but *U.S.A. Today* contained a substantial majority of opposing assertions about the Guinier candidacy. The *U.S.A. Today*'s coverage yielded 55.6% (15) supporting assertions and 44.4% (12) opposing assertions. There was a statistically significant difference between the number of opposing assertions versus the fewer supporting ones in the total coverage (Table 1).

The general thrust of the oppositional nature of the Guinier coverage was characterized by assertions such as : ". . . she intends to abolish one of the cornerstones of American democracy," "Thus, she proposes that a minority be empowered to veto the will of the majority;"[74] "[she] calls for racial quotas in judicial appointments," ". . . demands legislative outcomes, requiring abandonment not only of the 'one person, one vote' principle, but majority rule itself;"[75] "The aim of her legal activism is what she calls a 'meaningful vote' to elect 'authentic blacks,'" "[she has] exotic views;"[76] "[she scorns] the efforts of the Voting Rights Act to give blacks power within majority politics," "Racial polarization . . . She stands for those things;"[77] "[her] . . . writings . . . suggest that she would interpret the Voting Act in novel, even aberrant ways," "Even more disturbing are Ms. Guinier's ideas about legislatures;"[78] "She would use the Voting Rights Act . . . to guarantee that . . . lawmakers protect black interests," "To

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[74] Lally Weymouth, "Lani Guinier: Radical Justice," *The Washington Post*, May 25, 1993, pg. A19.

[75] Bolick, *op. cit.*

[76] "Hillary's Choice On Civil Rights: Back to the Future," by Paul A. Gigot, *The Wall Street Journal*, Friday, May 7, 1993, pg. A14.

[77] A.M. Rosenthal, "On My Mind; Clinton Voter Stays Glad," *The New York Times*, May 23, 1993, pg. A29.

[78] "Civil Rights Struggle Ahead," *The New York Times*, May 23, 1993, Sec. 4, pg. 14.

Guinier, its not enough for blacks to win a certain number of seats in the legislature;"[79] ". . . she does not share the goal of a colorblind society," ". . . Guinier does not seem to get the hang of democracy."[80]

Throughout the statistical analysis, Clint Bolick's two *Wall Street Journal* articles are isolated to compare findings between the two sets of data (N=27 & N=25) and to see if statistically significant results, that is, the direction of coverage would change without Bolick's articles, or would hold up without them. I did not isolate *The Wall Street Journal*'s articles entirely because, without Bolick's two articles, the Journal's contribution to the media coverage would have been two articles opposing and one supporting Guinier. When Clint Bolick's two *Wall Street Journal* articles are removed from the 27 stories, assertion analysis reveals a similar pattern in the remaining 25: 59.9% (248) opposing versus 40.1% (166) supporting assertions, even though Bolick's articles made up 21.2% (67) of opposing assertions among 27 stories. Statistical analysis shows that this distribution, too, is significant (See Table 2 in Appendix). Of the six publications covering the nomination, *The Wall Street Journal*'s coverage contained 29.8% (94) of all assertions opposing Guinier's nomination among the six publications. *The Wall Street Journal* ran two stories—a news brief and a guest column by two academics defending Guinier's ideas—that contained all the supporting assertions (40) in the *Journal*'s total coverage. The two articles run by *U.S. News & World Report* had the highest percentage of opposing assertions: 84.3% (43).

Distribution of opposing and supporting sources did not hold to similar patterns as did the assertions; in fact, there was a near reversal. For the 27 articles, sources cited were 46.1% (70) opposing to 53.% (82) supportive. For 25 articles (*sans* Bolick's) sources used were 40.6% (56) opposing to 59.4% (82) supporting. Neither distribution showed any statistical significance (See Tables 3 & 4 in Appendix). One conclusion that could be drawn from this is that though most of the sources cited were neutral and/or supportive of Guinier, the interpretative slant of the reporting itself was oppositional in nature. Of the six publications, *The New York Times* articles cited the highest percentage (and number) of supporting sources 71.2% (37). *U.S. News & World Report* had the highest percentage of opposing sources, 100%, (7) with no supporting sources. Although *The Wall Street Journal* had the highest number of opposing assertions, 94, opposing sources were 58.6% (17) and supporting sources 41.4% (12). For *The Wall Street Journal*, without Bolick's articles, supporting sources would be 80% (12) versus 20% opposing (3).

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[79] Bob Cohn, "Crowning a 'Quota Queen'?" *Newsweek*, May 24, 1993, pg. 67.
[80] John Leo, "A controversial choice at Justice," *U.S. News & World Report*, May 17, 1993, pg. 19.

The 13 categories into which assertions were coded are shown in Table 5 of Appendix. From this four antithetical groupings were constructed: "(PRO)-QUOTAS"/"NOT (PRO)-QUOTAS"; "RADICAL"/"NOT RADICAL" ('Radicalized by Opponents) ; "ANTI-DEMOCRATIC/"NOT ANTI-DEMOCRATIC"; "UNTENABLE CANDIDACY"/"QUALIFIED CANDIDATE." For each set of articles (N=27 and N=25), the distribution of the four antithetical groups throughout was tracked. The results are displayed in Tables 6 and 7 in Appendix. Two groupings show statistical significance in the frequencies by which they occur, "(PRO)-QUOTAS"/"NOT (PRO) QUOTAS" and "ANTI-DEMOCRATIC/"NOT ANTI-DEMOCRATIC."

The distribution of antithetical assertions in all articles was examined (See Tables 8 & 9 in Appendix). The same two groupings as above demonstrated statistical significance. For N=27, *pro-quota* assertions outnumber *not pro-quota* assertions almost six to one (34 to 6) and *anti-democratic* assertions outnumber *not anti-democratic* assertions slightly more than six to one (107 to 17). The distribution within these two sets of antithetical assertions is statistically significant (Table 8). Of the *pro-quota* assertions, *The Wall Street Journal* had 50%, *The Washington Post* had 23.5%, *U.S.A. Today* 0%; *Newsweek*, and *U.S. News & World Report*, *The New York Times* and *U.S. News & World Report* each had 8.8%. Of the *anti-democratic* assertions, *The Washington Post* had

36.4%, *The Wall Street Journal* had 21.5%, *The New York Times* and *U.S. News & World Report* each had 16.8%, *U.S.A. Today* had 6.5%, and *Newsweek* had 1.9%.

Without Bolick's *Wall Street Journal* articles, *pro-quota* assertions outnumber *not pro-quota* assertions by more than three to one (20 to 6) and *anti-democratic* assertions outnumber *not anti-democratic* assertions by more than five to one (90 to 17). The distributions for these two sets of antithetical assertions are also statistically significant (Table 9). Within this group, *The Washington Post* had 40% of the pro-quota assertions, *The Wall Street Journal, The New York Times, U.S. News & World Report*, and *Newsweek* each had 15%; *U.S.A. Today* had none. Within the anti-democratic assertions group, *The Washington Post* had 43.3%, *The New York Times* and *U.S. News & World Report* had 20% each, *U.S.A. Today* had 7.8%, *The Wall Street Journal* had 6.7%, and *Newsweek* had 2.2%.

DISCUSSION

What this study suggests is that the reporters and editors covering the Guinier "controversy" seemed unaffected by how acutely their efforts to report in an (presumably) objective and balanced manner were affected by those who did have an agenda to set and how they went about setting it.

Despite the fact that no where in her writings does Prof. Guinier advance the use of quotas[81]—racial or otherwise—nor does she advocate the use of anti-democratic "rigged" voting schemes to ensure minority empowerment, national media reporting of Guinier's writings heavily characterized her as a proponent of such. John Leo, a columnist for *U.S. News & World Report*, assessed Guinier as follows:

> She says — no implication here, just a flat statement — that America's electoral system of majority rule is illegitimate because it is founded on the prejudice of intransigent whites (a

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[81] See "Getting Guinier," *The Nation*, May 31, 1993, pg. 724-5; Patricia J. Williams "Lani, We Hardly Knew Ye," *The Village Voice*, June 15, 1993 pg. 25-6; "In Defense of Lani Guinier," by T. Alexander Aleinikoff and Richard H. Pildes, *The Wall Street Journal*, May 13, 1993, pg. A15.

> "permanent majority hegemony"). So she wants to limit majority rule. She favors "proportionate interest representation for self-identified communities of interest."
>
> Does this mean converting America into something resembling a European-style electoral system? It seems so. Guinier acknowledges that her plan "arguably weakens the two-party system." Elsewhere, she says that coalitions formed by the new electoral splinter groups "might ultimately promote minority political parties." What she doesn't say is that the political party that just appointed her might then breakup rather quickly.
>
> **Tribal rights.** These are very strange views for a civil rights chief to have. Civil-rights strategy has changed many times over the years, but it is safe to say that the Justice Department's division has not yet come under the sway of anyone who wants to toss out America's electoral system, replace it with race-based proportional representation and then, perhaps, settle down to splinter group politics in which each tribe has its own political party."[82]

University of Michigan law professors T. Alexander Aleinikoff and Richard H. Pildes evaluated Prof. Guinier's ideas on "proportionate interest representation" quite differently. They said, "These are not proposals to guarantee minority groups fixed, proportionate shares of political power. The principle at stake is best illustrated by Prof. Guinier's suggestion that more thought be given to "cumulative voting" *as a different approach to remedying violations of the [Voting Rights] act.*"[83] (Emphasis added) Although Leo sees race under every rock in Gunier's intellectual landscape, Guinier said, "Proportionate interest representation is therefore *not necessarily race-based* and allows for the possibility that not all members of a minority group share common interests or common perceptions of their interest."[84]

Prof. Guinier does not declare that all of America is besieged by "intransigent whites" but is concerned with situations where "hostile majorities" thwart the attainment of political equality and power sharing by minorities. "The theory of pluralism assumed shifting coalitions in which no one group would be permanently in the minority or permanently in the majority," Leff said in explaining Guinier's views, "*But racially polarized voting, which Guinier documents through numerous court cases, surveys, and scholarly studies, prevents that flux*. . . . [This] . . . on a theoretical level, (Guinier claims) . . . poses a problem for representative democracy."[85] (Emphasis added) "*Nor does it* [proportionate interest representation] *assume that all members of the majority group are hostile to minority groups*," according to Guinier. Cumulative voting, as applied to proportionate interest representation, "allows all politically cohesive interest groups, which are numerically relevant under the threshold of exclusion, to determine which interests are most important. *Politically cohesive interest groups are not all composed of minority group members*."[86] (Emphasis added)

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[82] Leo, op. cit.

[83] "In Defense of Lani Guinier," by T. Alexander Aleinikoff and Richard H. Pildes, *The Wall Street Journal*, May 13, 1993, pg. A15

[84] Guinier quoted in "Lani, We Hardly Knew Ye," by Patricia J. Williams, *The Village Voice*, June 15, 1993, pg. 27.

Cumulative voting, far from being a "strange view" or anti-democratic, is in common use by "European-style" *democracies*, has been and still is employed in various states and municipalities in this country (modified at-large voting), as well as a prevalent voting "scheme" of American corporations to ensure that minority interests are adequately represented. The fact that the Reagan and Bush administrations adopted cumulative voting and supermajority pluralities as methods of remedy under the Voting Rights Act seemed not to matter to media analysts of Guinier's alternatives to the problems of "one-man, one-vote" majoritarian electoral systems, who preferred to label them "radical," "out of the mainstream," and "pie-in-the-sky." John Leo's, like Clint Bolick's, real problem is in his "purported explanation[s] of Guinier's analysis."[87] Bolick's "explanation" of Guinier's "forty-two-page article in the *Harvard Civil Rights-Civil Liberties Law Review, was based on one paragraph and two footnotes*."[88] (Emphasis added) Guinier's political opponents made tremendous (and inaccurate) hay out of fragments and subordinated notes from Guinier's lengthy and scholarly articles. For the most part the media, like Leo, went along for the ride.

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[85] Leff, *op. cit.*, pg. 39.

[86] Guinier quoted in "Lani, We Hardly Knew Ye," by Patricia J. Williams, *The Village Voice*, June 15, 1993, pg. 27.

[87] Leo's analysis was based on "The Triumph of Tokenism" (*Michigan Law Review*, Mar. 1991) and "No Two Seats" (*Virginia Law Review*, Nov. 1991).

[88] Leff, *op. cit.*, pg. 40.

The Wall Street Journal, a widely respected and influential business newspaper, ran four articles opposing, and one supporting, Guinier's nomination, before the nomination was withdrawn. The *Journal* is known to have a decidedly conservative editorial slant.[89] (In the anti-Guinier editorial "The Last Frontier"[90] the *Journal* mused, "Even the Bush administration always had a weakness for quotas.") *The Wall Street Journal*'s editorialists, under the leadership of its editor, the Pulitzer Prize-winning Robert Bartley, have been consistently "the most stinging critics"[91] of Clinton and the Democrats now ruling the roost in Washington. *New York* magazine, in an "informal ranking" of the country's most influential editorial "factories," placed the *Journal* as number one in clout, ahead of number two *New York Times*. But *New York* noted that critics accuse the *Journal*'s editorial writers of "steamroll[ing] facts in the service of ideology."[92] Did Bolick and the *Journal* manage to steamroll the media with its anti-Guinier line, too?

Bolick's "shot," although clearly not random, was premeditated and preplanned.[93] According to *Washington Post* reporter Michael Isikoff, about one month before Clinton chose Guinier, Bolick was alerted to the possibility that he might choose a "very radical" law professor for the Justice position. According to Isikoff, Abigail Thernstrom, an academic acquaintance of Bolick, informed Bolick of Guinier's writings on civil rights issues. Leff in an article for the *Columbia Journalism Review* noted that Thernstrom and Guinier previously had engaged in "an extended, antagonistic debate."[94] Isikoff quoted Thernstrom as sarcastically quipping to Bolick, "Clint, you're going to love her."[95] Bolick immediately began to prepare for the possibility that Guinier might be nominated. When her nomination was publicly confirmed on April 29, Bolick said, "We were ready to hit the ground running."[96] Bolick, wrote Isikoff, finally had an opportunity to repay the civil rights lobby for its strong opposition to his longtime friend and mentor, Justice Clarence Thomas, during his senate confirmation hearings. The chance Bolick had been waiting for was at hand. Isikoff reported:

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[89] Daniel Gross, "Right Makes Might," *New York*, March 7, 1994, pgs. 40-45.
[90] *The Wall Street Journal*, May 3, 1993, pg. A16.
[91] Gross, *op. cit.*, pg. 42.
[92] *ibid.* pg. 43.
[93] Leff and Isikoff articles cited.
[94] Leff, *ibid.*, pg. 41.

> Working out of a small suite of offices across the street from the Justice Department, Bolick and colleague Chip Mellor became what they call "information central" for the Guinier battle, running up thousand of dollars in photocopying bills as they distributed more than 100 copies of her articles to key Senate staff aides, *journalists, editorial writers and other "opinion leaders."*[97] (Emphasis added)

Stuart Taylor, a *Legal Times* columnist who also wrote editorials opposing the nomination, said Bolick "kept the ball rolling and kept the pressure on."[98] *Los Angeles Times* Supreme Court reporter David Savage concluded that "*The Wall Street Journal* and Clint Bolick really went after her and managed to kill off this nomination."[99]

Opposing Guinier's nomination, it seems, was a tactic in a larger strategy employed by conservatives in drumming up ideological and political causes against Clinton. In a May 5 *New York Times* article, reporter Neil A. Lewis discussed an interview in which Bolick said that conservatives would choose to put their energies into just one fight: most likely, against a liberal choice by the president to fill retiring Byron R. White's seat on the Supreme Court. If Clinton's choice was more moderate, however, conservatives would fight Guinier's pending appointment more vigorously. "Clinton has not had to expend any political capital on the issue of quotas," said Bolick,

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[95] Isikoff, *op. cit.* pg. A11.

[96] *ibid.*

[97] *ibid.*

[98] *ibid.*

[99] Leff, *op. cit.*, pg. 41.

"and with her, we believe we could inflict a heavy political cost."[100] After Clinton pulled Guinier's candidacy, Bolick opined, "Clinton's action last night vindicates . . . [our] view."[101]

The appearance of the first anti-Guinier piece in the *Journal*'s editorial pages was a strong indication of possible bias and lack of objectivity in Clint Bolick's analysis of Guinier's writings; nonetheless, for the most part, the other national publications seemed to follow the *Journal*'s 'quota queen' headline and other cues on Guinier's "anti-democratic" and "radical" notions.

In retrospect, *The Wall Street Journal* seemed to have been almost preordained to lead the media charge against Guinier. "The wheels will turn the day someone from the NAACP Legal Defense Fund is nominated,"[102] the *Journal* prophesied, in an editorial the year before Guinier's nomination, after civil rights leaders had defeated one of George Bush's judicial nominations.

This study cannot pinpoint with a quantitative finality *exactly* what effects Guinier's critics did have on media coverage and the resultant impact upon the policy process as it affected Guinier's nomination. The study here was limited to only 27 articles among dozens of other print and broadcast reports that appeared during the period. If, however, a measure of success in "agenda setting" by Guinier's critics was to influence the direction of the tide of statements made about Guinier, then Clint Bolick (and others) were the first to contribute to a news media environment in which the assertions, and thus statements, about Guinier that appeared in the national news media analyzed in this study were biased almost two to one against her suitability as a candidate for assistant attorney general. Clearly this kind of news reporting is not

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[100] Neil A. Lewis, "Guerrilla Fighter for Civil Rights: Carol Lani Guinier," *The New York Times*, May 5, 1993, pg. A19.
[101] Campbell and Tackett, *op. cit.*, pg. 4.
[102] Bob Cohn, "Crowning a 'Quota Queen'? " *Newsweek*, May 24, 1993, pg. 67.

"balanced" journalism as measured by the quantitative yardsticks employed in this study.

Objectivity, balance, and newsworthiness are three watchwords that defenders of the American news media embrace. Yet it is clear that in the "idea-oriented campaign" Bolick and others ran, the composite of "ideas" appearing in the coverage presented by seven publications of national scope clearly failed to present a balanced picture of an important news event.

Time magazine, published a list in its June 14 issue of "The 10 Most important jobs Bill Clinton has yet to fill."[103] Job number one was Supreme Court Justice; number two was ambassador to Japan; number three was ambassador to Israel; number four was assistant attorney general, Civil Rights division. Ironically though, this was the first issue of *Time* which reported on (the demise of) Guinier's nomination.

"The issue that Lani Guinier attacks in her writings—the tyranny of the majority, as James Madison described it—is neither obscure nor an unworthy target," said Andrea Sachs in her June 14 *Time* article "Tailor-made to be Used Against Her."[104] After cutting so succinctly to a major concern of Guinier's writings, Sachs shifted gears in the next sentence. "But it's small wonder that few people are familiar with her scholarship. *Turgid and ambiguous,* Guinier's writing is not the stuff of bedtime reading." (Emphasis added) Two troublesome implications here seem to be that if an author's ideas are not digestible in forms comfortable to, or if they are misinterpreted by, the typical (bedtime)[105] reader, it is the fault of the author.[106] "Radical or not, Guinier's writing is tailor-made to be selectively used against her," said Sachs. The same belated conclusion was drawn in a number of stories that appeared *after* Clinton withdrew Guinier's nomination.[107]

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[103] *Time*, June 14, 1993, pg. 13.

[104] pg. 24.

[105] Sachs of course does not allude to the bedtime reader literally, but figuratively, to get across the idea that Guinier is not light reading. To take her to task too severely for the sleepy cliché would decontextualize the use of the literary method employed.

[106] But neither are the writings of philosopher Immanuel Kant, economist Milton Friedmann, or physicist Albert Einstein "bedtime reading," but few would argue that they do not have important theoretical and practical consequences, worthy of the effort to understand.

Nonetheless, in the next to last paragraph of Sachs's article, she committed the very sin she warned against by quoting an opponent of Guinier's nomination, Stuart Taylor, Jr.,[108] without acknowledging him as an opponent. He was contexted as having "studied Guinier's writings" and having come to this conclusion: she was radical, burdened with a "bleak vision" of America as a land of racially oppressed minorities. Is this sloppy journalism or blind journalism on *Time*'s part?

Part of the problem for Guinier and the press was in one guideline set by the Clinton administration for its nominees: Don't talk to the press before your confirmation hearings.[109] Some members of the press seemed to not understand this or to ignore it.[110] Guinier was finally allowed to break silence after no one in the White House seemed interested in vigorously defending against the charges being made in the press.[111] But ultimately this is no excuse for the failure of members of the press to adequately come to grips with Guinier's real views—which resulted in a caricature of Guinier's views that University of Chicago law dean and constitutional scholar Geoffrey Stone called a "cartoon."[112]

As noted earlier, the first anti-Guinier article appeared on April 30, 1993, in *The Wall Street Journal*. On May 3, the *Journal* followed with an anti-Guinier editorial. On May 5, *The New York Times* ran the aforementioned biographical piece on Guinier which reported quite clearly on Bolick's intention to oppose Guinier and make Clinton pay a political cost because of quotas.

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[107] Leff, *op cit.*, pg. 40.

[108] *ibid.*

[109] David J. Garrow, "Lani Guinier," *The Progressive*, September 1993, pg. 32.

[110] See Donald Bauer's parenthetical comment "Guinier did not return *U.S. News*' calls," made in his article "The trials of Lani Guinier," *U.S. News & World Report*, June 7, 1993, pg. 38.

[111] Lani Guinier, "Lani Guinier's Day in Court," *The New York Times Magazine*, February 27, 1994, pg. 44.

[112] Leff, *op. cit.*, pg. 38.

McCombs suggested that in covering controversial issues, like abortion, that journalists had demonstrated that they "agonize about what label to use for this issue because both of the terms commonly used by participants—'freedom of choice' and 'right to life'—are affectively loaded."[113] The coverage of the Guinier nomination does not suggest that journalists "agonized" very much at all in labeling her. But Bolick, of course, unlike the other "journalists," was involved in more than just reporting. He was the first instigator in print of the 'news event,' with a definite agenda.

In the Guinier controversy such words as "quotas," "anti-democratic," and "radical" were the "affectively loaded" words. Bolick realized this and the importance of such words to his campaign when he said "Mr. Clinton owes his election in no small part to the disappearance of the "Q" word from the political lexicon in 1992. If he persists in entrusting the civil rights law enforcement apparatus to the likes of Ms. Guinier . . . [it] will prove the most incendiary of political miscalculations."[114] Almost 80% of the assertions he used to argue against Guinier's candidacy classified her as being pro-quota, anti-democratic, and radical.

"Agenda setting," said McCombs, "is considerably more than the classical assertion that the news tells us *what to think about*. The news also tells us *how to think about it*. Both the selection of objects for attention and the selection of frames for thinking about these objects are powerful agenda-setting roles. Central to the news agenda and its daily set of objects—issues, personalities, events, etc.—are the perspectives that journalists and, subsequently, members of the public employ to think about each object. These perspectives direct attention toward certain attributes and away from others. *The generic name for these journalistic perspectives is newsworthiness.* But newsworthy objects are framed in a wide variety of ways."[115] (Emphasis added)

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[113] McCombs, op. cit., pg. 63.
[114] Clint Bolick, op. cit.
[115] McCombs, op. cit. pg. 62.

Just as the first neutron bomb story framed ("the bomb that kills people but leaves buildings and other property intact") all subsequent coverage and discussion of the bomb's development and deployment, despite a ten month effort by Carter administration officials' to steer the press away from this focus,[116] the first tag-line ("a 'quota queen,' with weird anti-democratic theories") for Guinier proved decisive. The resultant fallout was not as some Guinier critics assumed, a vindication of "the system" working[117] or democracy-in-action: the press exposes an out-of-the-mainstream nominee, more suited for enforcing Bosnian-styled civil rights than American, puts her in the sunshine of the public eye, and she gets sent packing back to academialand. Guinier's confirmation hearings, part of the "system," — the system's way of "getting to the bottom" of what candidates really mean, in what can be, admittedly, a political charged atmosphere — was short-circuited. This is, however, a very good case of Linsky's "media democracy," in which the press alters the course of policymaking, not public debate; or Ettema et al.,'s "mass-mediated power game" in which the media's surrogateship effectively "decenters" the public's opinion. The "system" that worked was the "system" of media impact on policymaking, not the impact of public opinion.

The newsworthiness that editors and reporters found was vested in the conflict and controversy of the Guinier story: what critics were saying about Guinier's ideas, the "looming" confirmation battle; this was the news, not the substance of Guinier's academic/legal thinking. A clear distillation of Guinier's ideas were not as relevant as other real or potential newsmaking factors — "Borking Guinier," "Clinton's left wing nominees," "Conversative opposition to the President's candidate," "Is this Anita Hill Revisited?" Although the media is dressed up as a forum for public discourse, it tends to have its agenda set by factors more intrinsic to the manufacture of "news," not debate and discussion.

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[116] Linsky, ***Impact***, pgs. 21-35.

[117] John Leo, "A second look at Lani Guinier, *U.S. News & World Report*, March 14, 1993, pg. 19. Leo said, "The alarm came from the right, but her ideas seemed so radical that doubts about her quickly arose on the left and in the center (the *New York Times*, the *New Republic*, moderates in think tanks and the Senate). The president analyzed her ideas, said those ideas were difficult to defend and pulled her nomination. Isn't this how the system is supposed to work?"

"The most useful accounts of how media priorities are determined," said Swanson, "point to the influence of especially prestigious news outlets and organizations, the emergent culture and routine interactions governing reporters' relationships with official news sources, and the interpretive frames used to transform events into news 'stories.' "[118] By continuing, wittingly or unwittingly, to frame their coverage of Guinier's ideas and candidacy in the same rhetoric and narrow "range of attributes" as her opponents, journalists without an agenda furthered the aims of those who clearly had an agenda.

Virtually none of the "debate" about Guinier's candidacy focused on her qualifications and the requirements of the job. And even if the press's take on Guinier was accurate, could her academic notions been translated into Justice policy? This was a "third-level" Justice position, whose job it is to carry out executive level policy. Lost on the press, as Patricia J. Williams put forth, was that ". . . the test was whether or not she could follow the law and advance the president's policies, as she had done in her years at Justice under President Carter—a point Janet Reno kept making . . ."[119] "Scholarly articles should not, not of course, be immune from scrutiny in a confirmation battle," said Leff, "But . . . the writings . . . [should be] . . . relevant to the nominee's potential responsibilities."[120] *The Chicago Tribune,* a newspaper with a conservative bend and long record of endorsing Republican presidential candidates, saw Guinier as an "unconventional—even radical—thinker whose views are well to the left of the legal community, the American people and Bill Clinton himself," yet endorsed her, reasoning:

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[118] Swanson, op. cit., pg. 614.
[119] Patricia J. Williams," Lani, We Hardly Knew Ye," *The Village Voice*, June 15, 1993, pg. 28.
[120] Leff, *op. cit.*, pg. 38.

> The error here—as in the case of Bork—is to assume that what a scholar suggests in an academic article is also what she will pursue in public office. Law professors are paid to challenge established dogma, to provoke discussion, to follow ideas wherever they may lead. . . .
>
> No one is about to give the civil rights division the green light to try and get a court to demand a minority veto over legislation. Guinier, even if she were so inclined, will not be allowed to push any radical agenda in litigation. Who will prevent her? The attorney general and the president. And if they don't, then there will be plenty of options for holding them accountable, a duty the Republicans will not shirk.
>
> . . . Lani Gunier's critics have provided many reasons she should not be running the country—and none why she should not be running the civil rights division.[121]

The elite national media did not provide a diversity of viewpoints on the issues involving Gunier's nomination, which is underscored by the *Tribune*'s editorial. Instead they evidenced a convergence indicative of a "consensual" viewpoint regarding her ideas and candidacy. This convergence although "functional" for the news organizations, did not further informed or productive discussion and debate by the public or policymakers.[122]

When Lally Weymouth, a *Washington Post* columnist, wrote "As voting rights expert Abigail Thernstrom puts it, 'Guinier is a candidate of the far left, a spokesman for very radical policies. She does not believe in the democratic process as we now understand it,' "[123] Weymouth has framed a perspective, *an agenda of attributes,* through which she filtered Guinier views, *in her own thinking and for her readers.* Hence, Weymouth can say that "Guinier's writings leave no doubt where she stands. In recent articles, she spells out her goal: to do away with the contemporary American electoral system," despite the fact Guinier proposed this nowhere in her writings. To the extent that the "American electoral system" is part of the "democratic process," the editors of the *Post* must have disagreed with Weymouth, for on the Sunday (June 6) following Clinton's withdrawal, the paper said in the editorial "The Lani Guinier Affair":

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[121] "No grounds to reject this nominee," *The Chicago Tribune*, May 27, 1993, Sec. 1, pg. 30.

[122] Reese and Danielian, *op. cit.*, pg. 30-1.

[123] Weymouth, *op. cit.*

> Having slogged our way through the lengthy, heavily footnoted and far from easy-to-read articles Ms. Guinier wrote, our own conclusion was that while some parts of them did raise serious questions that needed explanation, it was neither fair nor accurate to characterize Ms. Guinier the way her severe critics and caricaturists had done. *She is most definitely not the "anti-democratic" ogre of their portrayal.* (Emphasis added)[124]

Perhaps equally disturbing here is evidence of a kind of selective anti-intellectualism in the press, in which the discussion of ideas involving sacrosanct notions by some is tolerated, but vehemently attacked if raised by others. A chief justice of the Supreme Court, Warren Burger, once wrote, "There is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.[125] George Will, one of Guinier's most vitriolic critics had written, "The framers also understood that *stable, tyrannical majorities can best be prevented by the multiplication of minority interests, so the majority at any moment will be just a transitory coalition of minorities*"[126] (Emphasis added) but nevertheless assailed Guinier for having "extreme, undemocratic and anticonstitutional" ideas.[127] Finally, and most disturbing, the elite media's treatment of Guinier suggests of a strain of "modern racism." Erwin Chemerinsky, University of Southern California Law Center constitutional scholar, said of Guinier, that her ideas were "not about quotas; . . . not about affirmative action; . . . not about affirmative action in voting. If she wasn't a black woman I'm not sure it would have come out that way [in the news media]."[128] Guinier's discussion of notions that (seemingly) struck at the heart of democracy was portrayed, to an alarming extent, by national news media as abhorrent, irrelevant, and impertinent, despite the Madisonian underpinnings of her scholarship.

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[124] "The Lani Guinier Affair," *The Washington Post*, pg. C6.
[125] Guinier, *op. cit.*, pg. 66.
[126] *ibid.*
[127] George F. Will, "Sympathy for Guinier," *Newsweek*, June 14, 1993, pg. 78.
[128] Leff, *ibid.*, pg. 39.

The data analyzed here does confirm that the appearance of the pro-quota and anti-democratic arguments, and the preponderance of opposing arguments as used against the Guinier nomination, were part of a purposeful, not accidental, pattern of commentary and reporting. These arguments did find a certain resonance in the media studied which cannot be analytically or empirically attributed to what Prof. Guinier actually did write but rather to what was said about her writings.[129]

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[129] In the aftermath of the Clinton's withdrawal, several writers (including Guinier herself) provided excellent analyses and rebuts of Guinier's critics' accusations and distortions. Of course, there were excellent rebuts while the nomination was still "live" also. See aforementioned articles by Guinier, Leff, Garrow, Williams, and Campbell and Tackett.

APPENDIX

TABLE 1

Distribution of Opposing and Supporting Assertions for all articles (N = 27)

PUBLICATION[1]	Opposing Assertions	Supporting Assertions
New York Times	69 (58.5%)	49 (41.5%)
U.S.A. Today	12 (44.4%)	15 (55.6%)
Wall Street Journal	94 (70.1%)	40 (29.9%)
Washington Post	78 (65%)	42 (35%)
U.S. News & World Report	43 (84.3%)	8 (15.7%)
Newsweek	19 (61.3%)	12 (38.7%)
	Cramer's V = .428 df = 5 p<.001	
TOTALS*	315 (65.5%)	166 (34.5%)

**Phi = .157 df = 1 p<.001*

[1] *Time* magazine ran no Guinier articles during the period 4/30/93 to 6/3/93.

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TABLE 2

Distribution of Opposing and Supporting Assertions without Bolick's *WSJ* articles (N = 25)

PUBLICATION[1]	**Opposing Assertions**	**Supporting Assertions**
New York Times	69 (58.5%)	49 (41.5%)
U.S.A. Today	12 (44.4%)	15 (55.6%)
Wall Street Journal	27 (40.3%)	40 (59.7%)
Washington Post	78 (65%)	42 (35%)
U.S. News & World Report	43 (84.3%)	8 (15.7%)
Newsweek	19 (61.3%)	12 (38.7%)
	Cramer's V = .466 df = 5 p<.001	
TOTALS*	248 (59.9%)	166 (40.1%)

**Phi = .099 df = 1 p<.01*

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[1] ***Time*** magazine ran no Guinier articles during the period 4/30/93 to 6/3/93.

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TABLE 3

Distribution of Opposing and Supporting Sources for all articles (N = 27)

PUBLICATION[1]	Opposing Sources	Supporting Sources
New York Times	15 (28.8%)	37 (71.2%)
U.S.A. Today	4 (33.3%)	8 (66.7%)
Wall Street Journal	17 (58.6%)	12 (41.4%)
Washington Post	23 (53.5%)	20 (46.5%)
U.S. News & World Report	7 (100%)	0 (0%)
Newsweek	4 (44.4%)	5 (55.6%)
TOTALS*	70 (46.1%)	82 (53.9%)

**Phi = .039   df = 1   p<.5   (not significant)*

[1] ***Time*** magazine ran no Guinier articles during the period 4/30/93 to 6/3/93.

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TABLE 4

Distribution of Opposing and Supporting Sources without Bolick's *WSJ* articles (N = 25)

PUBLICATION[1]	Opposing Sources		Supporting Sources	
New York Times	15	(28.8%)	37	(71.2%)
U.S.A. Today	4	(33.3%)	8	(66.7%)
Wall Street Journal	3	(20%)	12	(80%)
Washington Post	23	(53.5%)	20	(46.5%)
U.S. News & World Report	7	(100%)	0	(0%)
Newsweek	4	(44.4%)	5	(55.6%)
TOTALS*	56	(40.6%)	82	(59.4%)

**Phi = .095   df = 1   p<.2   (not significant)*

[1] ***Time*** magazine ran no Guinier articles during the period 4/30/93 to 6/3/93.

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TABLE 5

Distribution of Assertions by Category in all articles

OPPOSING			
PRO-QUOTA	**34**	(10.8%)*	(7.1%)**
RADICAL	**50**	(15.9%)	(10.4%)
RACIALIST	**51**	(16.2%)	(10.6%)
PRO-BLACK	**14**	(4.4%)	(2.9%)
ANTI-DEMOCRATIC	**107**	(34%)	(22.2%)
UNTENABLE CANDIDATE	**18**	(5.7%)	(3.7%)
OTHER	**41**	(13%)	(8.5%)
TOTAL	**315**	(100%)	(65.5%)
SUPPORTING			
NOT PRO-QUOTA	**6**	(3.6%)***	(1.2%)**
RADICALIZED BY CRITICS	**35**	(21.1%)	(7.3%)
QUALIFIED CANDIDATE	**19**	(11.4%)	(4%)
PRO-DEMOCRATIC	**17**	(10.2%)	(3.5%)
VIEWS DISTORTED BY CRITICS	**46**	(27.7%)	(9.6%)
OTHER	**43**	(25.9%)	(8.9%)
TOTAL	**166**	(100%)	(34.5%)

*Percentages of opposing assertions.
**Percentages of all assertions.
***Percentages of supporting assertions.

TABLE 6

Distribution of Antithetical Arguments by articles (N = 27)

"QUOTAS"	Pro	Not Pro	
Argument Used	13	3	*Phi = .406* *df = 1* *p<.01*
Argument Not used	14	24	

"RADICAL"	Is	Not	
Argument Used	14	11	*Phi = .111* *df = 1* *p<.8* *not significant*
Argument Not used	13	16	

"DEMOCRATIC"	Anti	Pro	
Argument Used	21	6	*Phi = .556* *df = 1* *p<.001*
Argument Not used	6	21	

"CANDIDACY"	Untenable	Qualified	
Argument Used	11	9	*Phi = .077* *df = 1* *p<.8* *not significant*
Argument Not used	16	18	

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TABLE 7

Distribution of Antithetical Arguments by articles (N = 25)[*]

“QUOTAS”	Pro	Not Pro	
Argument Used	11	3	*Phi = .356* *df = 1* *p<.02*
Argument Not used	14	22	

“RADICAL”	Is	Not	
Argument Used	12	11	*Phi = .040* *df = 1* *p<.8* *not significant*
Argument Not used	13	14	

“DEMOCRATIC”	Anti	Pro	
Argument Used	19	6	*Phi = .520* *df = 1* *p<.001*
Argument Not used	6	19	

“CANDIDACY”	Untenable	Qualified	
Argument Used	11	9	*Phi = .081* *df = 1* *p<.7* *not significant*
Argument Not used	14	16	

[*] Clint Bolick's two ***Wall Street Journal*** articles excluded.

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TABLE 8

Instances of Antithetical Assertions in 27 articles

"QUOTAS"	Pro	Not Pro
Number of Instances	34 (85%)	6 (15%)

Phi = .374
df = 1
p<.001

"RADICAL"	Is	Not
Number of Instances	50 (58.8%)	35 (41.2%)

Phi = .089
df = 1
p<.3
not significant

"DEMOCRATIC"	Anti	Pro
Number of Instances	107 (86.3%)	17 (13.7%)

Phi = .389
df = 1
p<.001

"CANDIDACY"	Untenable	Qualified
Number of Instances	18 (48.6%)	19 (51.4%)

Phi = .004
df = 1
p<.9
not significant

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TABLE 9

Instances of Antithetical Assertions in 25 articles*

"QUOTAS"	Pro	Not Pro	
Number of Instances	**20** **(76.9%)**	**6** **(23.1%)**	*Phi = .280* *df = 1* *p<.05*

"RADICAL"	Is	Not	
Number of Instances	**28** **(44.4%)**	**35** **(55.6%)**	*Phi = .056* *df = 1* *p<.9* *not significant*

"DEMOCRATIC"	Anti	Pro	
Number of Instances	**90** **(84.1%)**	**17** **(15.9%)**	*Phi = .363* *df = 1* *p<.001*

"CANDIDACY"	Untenable	Qualified	
Number of Instances	**18** **(48.6%)**	**19** **(51.4%)**	*Phi = .004* *df = 1* *p<.99* *not significant*

*Clint Bolick's two ***Wall Street Journal*** articles excluded.

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